. 85-5454-CSY
atus: GRANTED
PITAL CASE

Title: David Randolph Gray, Petitioner
v.
Mississippi

Court: Supreme Court of Mississippi

Counsel for petitioner: Volinsky, Andru H.

cketed:
ptember 23, 1985

Counsel for respondent: White Jr., Marvin L.

try	Date	Note	Proceedings and Orders
1	Sep 23 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 23 1985		Order extending time to file response to petition until November 22, 1985.
5	Nov 26 1985		Order further extending time to file response to petition until December 22, 1985.
6	Dec 23 1985		Brief of respondent Mississippi in opposition filed.
7	Jan 2 1986		DISTRIBUTED. January 17, 1986
9	Jan 21 1986		REDISTRIBUTED. January 24, 1986
2	Feb 7 1986		REDISTRIBUTED. February 21, 1986.
4	Feb 24 1986		Petition GRANTED.
			**********
6	Mar 8 1986		Order extending time to file brief of petitioner on the merits until May 1, 1986.
7	Apr 11 1986		Record filed.
8	Apr 11 1986		Certified original record, 10 volumes, received.
9	Apr 24 1986		Brief of petitioner David R. Gray filed.
3	May 6 1986		Joint appendix filed.
2	May 15 1986		Order extending time to file brief of respondent on the merits until June 23, 1986.
3	Jun 18 1986		Order further extending time to file brief of respondent on the merits until July 14, 1986.
4	Jul 14 1986		Brief of respondent Mississippi filed.
5	Jul 14 1986		Brief amicus curiae of North Carolina Atty.General, et al. filed.
5	Jul 25 1986		CIRCULATED.
7	Sep 3 1986		SET FOR ARGUMENT. Wednesday, November 12, 1986. (4th case) (1 hour)
3	Nov 3 1986	X	Reply brief of petitioner David R. Gray filed.
9	Nov 12 1986		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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85-5454

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DAVID RANDOLPH GRAY,

PETITIONER,

v.

STATE OF MISSISSIPPI,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT FOR THE
STATE OF MISSISSIPPI

ANDRU H. VOLINSKY
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September 17, 1985

Question Presented For Review

A. WHETHER PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED IN THIS CAPITAL MURDER TRIAL BY THE TRIAL COURT'S EXCUSAL FOR CAUSE OF A POTENTIAL JUROR WHO WAS CLEARLY QUALIFIED TO BE SEATED AS A JUROR UNDER THE ADAMS AND WITT CRITERIA.

1. Whether such an error can ever be considered harmless.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. _____

DAVID RANDOLPH GRAY,

PETITIONER,

v.

STATE OF MISSISSIPPI,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

The Petitioner, David Randolph Gray, through counsel respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court for the State of Mississippi . entered on July 24, 1985.

I. Question Presented For Review

A. WHETHER PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED IN THIS CAPITAL MURDER TRIAL BY THE TRIAL COURT'S EXCUSAL FOR CAUSE OF A POTENTIAL JUROR WHO WAS CLEARLY QUALIFIED TO BE SEATED AS A JUROR UNDER THE ADAMS AND WITT CRITERIA.

1. Whether such an error can ever be considered harmless.

II. Opinion Below

The Mississippi Supreme Court entered its opinion, en banc, on June 5, 1985. The Court was divided, 6-3, on the issues presented herein. A copy of the en banc decision is attached as Appendix A.

The Court denied Petitioner's request for rehearing on July 24, 1985. A copy of the Court's order is attached as Appendix B.

III. Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

IV. Constitutional Provisions Involved

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.

Fourteenth Amendment, United States Constitution

> 1. Citizenship rights not to be abridged by states.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .

V. Statement of the Case

On June 5, 1985, the Mississippi Supreme Court, en banc, affirmed the conviction of Petitioner for capital murder and the resultant sentence of death. The Court was divided 6-3 on the issues presented herein.

A timely petition for re-hearing and brief were filed by Petitioner. Said request was denied by the Mississippi Supreme Court by an order dated July 24, 1985.

The Mississippi Supreme Court considered and ruled upon the propriety of the exclusion of a juror, Mrs. Bounds, on Witherspoon grounds. The Court, in its majority opinion, found that although "[Mrs. Bounds] was clearly qualified to be seated as a juror under the Adams and Witt criteria," State v. Gray, 472 So.2d 409, 422 (Miss. 1985), the trial court's decision to strike the juror for cause was no more than a correction of the court's prior erroneous refusals to permit cause challenges of other jurors.

Three members of the Mississippi Supreme Court dissented on the point. Citing Davis v. Georgia, 429 U.S. 122,

97 S. Ct. 399, 50 L Ed 2d 339 (1976), the dissent argued that this type of dismissal for cause could not be "sanctioned as 'harmless error'." 472 So.2d at 425.

The voir dire of Mrs. Bounds appears at pp. 391-417 of the trial transcript (hereafter Tr.). In pertinent part, Mrs. Bounds was questioned as follows.

By Mr. Necaise: [The Prosecutor]	Mrs. Bounds, do you feel like this is a case, and I don't, I certainly don't want you to think that I'm picking on you. But, uh, what we are trying to do here is that we are trying to pick twelve people, uh, who we feel that, uh, would be fair and impartial persons, what we are looking for is people who could be fair and impartial and who could, if the evidence warranted it, could impose the Death Penalty because we feel that this is a case that warrants the imposition of the Death Penalty. We know that the law allows it. And could you tell me, do you feel like you could reach a verdict in this case, either guilty or not guilty in this case?
By Mrs. Bounds: [The prospective juror]	Could I reach a verdict?
By Mr. Necaise:	A verdict.
By Mrs. Bounds:	A verdict?
By Mr. Necaise:	Yes, ma'am.
By Mrs. Bounds:	Either way?
By Mr. Necaise:	Yes, Ma'am.
By Mrs. Bounds:	Yes
By Mr. Necaise:	You could reach a verdict of guilty or not guilty. Now, if that verdict was guilty and you felt that from the evidence that you used to find him guilty, that evidence which you had used to find him guilty, if you felt that that evi-

dence was of such a heinous, atrocious and cruel manner, do you feel that you could vote for imposing the Death Penalty on this twenty-eight year old Defendant?

By Mrs. Bounds: Yes.

By Mr. Necaise: Ma'am?

By Mrs. Bounds: Yes.

By Mr. Necaise: Judge, the lady says yes, but we would challenge her for cause.
(Tr. at 411-413)

Without any further questioning of Mrs. Bounds, the trial court excused her for cause. (Tr. 417).

VI Reason For Granting The Writ

A. THE TRIAL COURT'S ERROR, IN EXCUSING A CLEARLY QUALIFIED JUROR FOR CAUSE, CANNOT BE CONSIDERED HARMLESS.

The exclusion for cause of Mrs. Bounds denied Petitioner his right to a jury that was fair and impartial. Sixth Amendment, United States constitution. Jurors may only be excluded for cause if they are biased. See Reynolds v. United States, 98 U.S. 145, 157, 25 L.Ed 244 (1879). The standard for determining bias requires the trial court to determine "whether the jurors's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath.'" Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844, 852, 83 L.Ed2d 841, 851-852 (1985) (Footnote omitted)

Here, Mrs. Bounds did not evidence views that would have substantially impaired her performance as a juror. As admitted by the Mississippi Supreme Court, "she was clearly qualified to be seated as a juror under the Adams and Witt criteria." (Citation omitted) Gray v. State, 472 So2d 409, 422 (Miss. 1985) (Citation omitted).

Nonetheless, Mrs. Bounds was excused by the trial court

for cause. The trial court's error was then found to have been harmless by the Mississippi Supreme Court.

The facts sub judice are completely consistent with those present in Georgia v. Davis, 429 U.S. 123, 97 S.Ct. 399, 50 L.Ed2d 339 (1976). In Davis, the improper exclusion of a juror invalidated the subsequent imposition of the death penalty.

The holding of this Court in Davis is plain. The erroneous exclusion of jurors cannot be harmless. The Mississippi Supreme Court's failure to reverse Petitioner's sentence of death was clearly erroneous. It is in direct conflict with this Court's decision in Davis. This Court should, therefore, issue the requested writ of certiorari, reverse Petitioner's sentence of death, and remand for a new sentencing hearing before a fair and impartial jury.

VII Conclusion

WHEREFORE, for the foregoing reasons Petitioner requests the Court:

1. issue a writ of certiorari to the Mississippi Supreme Court;
2. reverse Petitioner's sentence of death;
3. remand this cause for a new sentencing hearing; and
4. for such other relief as the Court deems just and proper.

DATED: September 20, 1085

Respectfully submitted,

Andru H. Volinsky
SCHAPIRA AND GREEN, P.A.
108 Bay Street
Manchester, NH 03104
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ATTEST
A True Copy
This Day 17th day of September, 1985
ROBERT G. WOMACK, CLERK
SUPREME COURT OF MISSISSIPPI
By [signature]

WEDNESDAY, JULY 24, 1985, COURT SITTING : : : : :

DAVID RANDOLPH GRAY)
) This cause this day came on to be heard on Petition for
#55,738 v)
) Rehearing filed herein and this Court having sufficiently
STATE OF MISSISSIPPI)
examined and considered the same and being of the opinion that the same should be denied doth order that said petition be and the same is hereby denied.

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Amoco had no right to pro
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horn—A 5/16ths share of the interest on the 13/16ths working interest of Amoco for the life of Sallie Clark.

Amoco is not entitled to the use of the corpus of the 13/16ths working interest or any income from the investment of that sum until the death of Sallie Clark. All profits from that sum during the life of Sallie Clark belong to Speights and Hathorn to be divided as set out above. It is Amoco's duty to insure that the corpus of the 13/16ths working interest provides a fair rate of return for Speights and Hathorn whether it retains the 13/16ths and becomes personally liable for the interest or whether it invests that sum with a third party responsible for paying the interest. Because of the failure of the chancery court to define the parties' interests as we have set them out above, we hereby reverse and remand this cause for proceedings consistent with this opinion.

REVERSED AND REMANDED.

PATTERSON, C.J., WALKER and ROY NOBLE LEE, P.JJ., and HAWKINS, PRATHER, ROBERTSON, SULLIVAN and ANDERSON, JJ., concur.

WEST HEADNOTE SYSTEM

David Randolph GRAY

v.

STATE of Mississippi.

No. 55738.

Supreme Court of Mississippi.

June 5, 1985.

Rehearing Denied July 24, 1985.

Defendant was convicted in the Circuit Court, Harrison County, J. Ruble Griffin, J., of capital murder and sentenced to death, and he appealed. The Supreme Court, Ivan, J., held that: (1) defendant was not entitled to compel attendance of two prisoners to testify; (2) the State laid sufficient predicate to impeach its own witness; (3) evidence was not sufficient to allow a manslaughter conviction; (4) circumstantial evidence instructions were adequate; (5) admission of arrest and probation revocation forms for sentencing was permissible; (6) evidence was sufficient to allow death penalty for felony-murder; and (7) proportionality review did not require review of all capital murder cases. The court, in an opinion by Dan M. Lee, J., also held that trial court did not improperly exclude a prospective juror after State's exhaustion of peremptory challenges.

Affirmed.

Sullivan, J., dissented in part in an opinion joined by Patterson, C.J. and Robertson, J.

1. Witnesses ⇐2(1)

Accused's right to compulsory process is not absolute and state may require a showing of some colorable need for persons to be summoned to avoid abuse of the right. Const. § 26; U.S.C.A. Const.Amend. 6.

2. Witnesses ⇐2(1)

Defendant was not entitled to have two prisoners brought to his trial to testify that another individual had told them that she had committed crime for which he was charged since their testimony would be hearsay and could not be used to impeach that individual's testimony after she invoked her Fifth Amendment rights. Const. § 26; U.S.C.A. Const.Amends. 5, 6.

3. Criminal Law ⇐730(8)

Remark of prosecutor, concerning a witness, that "I didn't know he would lie. I thought he would testify like his statement" was improper; however, trial court corrected the matter by admonishing jury to disregard the comment.

4. Witnesses ⇐380(5)

State laid sufficient predicate to impeach its witness with prior statements, which were so inflammatory as to infect the sentencing phase of trial, where witness, who was illiterate, never informed state that he would testify differently than his statement concerning defendant's manner after crime and State may genuinely not have expected him to be hostile, he proved less than cooperative during direct examination and his statements on redirect may have genuinely surprised State.

5. Constitutional Law ⇐266.1(1)

Evidence of defendant's postarrest silence violates due process since it is fundamentally unfair to afford a suspect right to remain silent and yet allow implications of his silence to be used against him. U.S. C.A. Const.Amend. 5.

6. Criminal Law ⇐407(1), 1169.12

Admission of reference by witness to defendant's intention to remain silent after arrest was improper; however, error was harmless where single reference was neither repeated nor linked with defendant's exculpatory statement, trial judge charged jury at conclusion of trial that no adverse inference could be drawn from invocation of right to remain silent and there was overwhelming evidence of guilt beyond a reasonable doubt. U.S.C.A. Const.Amend. 5.

7. Criminal Law ⇐847

Defendant's failure to object or to request an appropriate instruction defining elements of underlying felony elevating murder to capital murder waived any objection on the issue.

8. Criminal Law ⇐1038.3

Defendant's failure to request a lesser included offense instruction prevented Supreme Court from finding that defendant was entitled to such instruction.

9. Criminal Law ⇐814(3)

Jury instructions are not given unless there is an evidentiary basis for them.

10. Homicide ⇐239

In prosecution for capital murder, evidence was not sufficient to allow finding that defendant acted in the heat of passion and without malice aforethought, so as to justify manslaughter conviction in light of his testimony that he never stabbed the victim, and in absence of evidence changing character of killing, which had malicious and premeditated origin in kidnapping of victim and his girl friend by defendant and others.

11. Criminal Law ⇐829(15)

Trial court did not improperly refuse to grant several requested instructions relating to circumstantial evidence where a very strong circumstantial evidence instruction was granted to defendant which accomplished same thing as the refused instructions.

12. Homicide ⇐354

In sentencing phase of capital murder proceeding, commitment paper indicating that defendant had been convicted of aggravated assault and placed on probation, attached to which was arrest warrant and probation revocation forms indicating he had committed another unnamed offense, was admissible since papers only showed that he eventually served time for aggravated assault, but did not reveal crime for which probation was revoked, and could not have prejudiced him very differently from his own admissions of other crimes.

13. Homicide ⇐354

In prosecution for murder committed during the course of a kidnapping in which victim's wallet was also stolen, both whether murder was committed for pecuniary gain and whether it occurred during course of kidnapping could be aggravating factors for sentencing purposes.

14. Homicide ⇐354

In sentencing proceedings in capital felony murder prosecution, admission by defendant that another individual told him that she wanted victim killed and that he supplied her with murder weapon after disabling the victim was sufficient to establish requisite personal culpability to permit death penalty.

15. Criminal Law ⇐1134(3)

There is no proportionality review requirement that death penalty case be compared to all capital murder cases, even those in which life sentence was imposed or not appealed to Supreme Court. Code 1972, § 99-19-105(3)(c).

16. Jury ⇐133

In capital murder prosecution, whether prospective juror is qualified depends upon ability of juror to follow instructions and juror's oath; better practice in voir dire of such jurors is to avoid ruling on each prospective juror's qualifications in presence of other prospective veniremen to avoid teaching those who wish to be excused what responses to make.

17. Criminal Law ⇐1166.17

Defendant in capital murder prosecution was not prejudiced by court's dismissal for cause of a prospective juror after State had exhausted its peremptory challenges, due to her equivocal responses, although she was qualified to serve in a capital case, in order to correct court's prior error in requiring State to exercise peremptory challenges to exclude prospective jurors who stated unequivocally that they could not vote for sentence of death under any circumstances.

18. Homicide ⇐354

Death penalty imposed for murder committed in the course of a kidnapping was not, under the circumstances, wanton, freakish, excessive, nor disproportionate.

Earl B. Stegall, Otto A. Wusnack, Gulfport, for appellant.

Edwin Lloyd Pittman, Atty. Gen. by Marvin L. White, Jr. and William S. Boyd, III, Sp. Asst. Attys. Gen., Jackson, for appellee.

En Banc.

David Randolph Gray was indicted, along with Attina Marie Cannaday and Dawn Bushart, for capital murder for the kidnapping and homicide of one Ronald Wojcik, but tried separately. Gray's trial preceded Cannaday's, but her appeal was heard first. *Cannaday v. State*, 455 So.2d 713 (Miss. 1984). Gray's trial resulted in a guilty verdict and imposition of the death penalty. On appeal, he asserts that the trial court erred during the guilt phase in:

1. denying his motion for the return of two prisoners from Parchman to testify on his behalf;

2. overruling objections to the prosecutor using a prior inconsistent statement to impeach its own witness;

3. overruling a motion for mistrial after a state witness commented on Gray's right to remain silent;

4. failing to instruct the jury as to the elements of the underlying felony of kidnapping;

5. failing to grant a lesser included offense instruction on simple murder;

6. refusing to grant lesser included offense instructions on manslaughter and kidnapping; and

7. refusing certain circumstantial evidence instructions.

Gray asserts that the trial court erred in the sentencing phase in:

8. overruling his objection to admission into evidence of copies of an arrest warrant and revocation of probation form;

9. including in the sentencing instruction the aggravating circumstance of whether the murder was committed for pecuniary gain, and

10. failing to charge the jury to make the findings required by *Enmund v. Florida*.

Finally, Gray contends that our Supreme Court proportionality review:

11. is inadequate under the express terms of Mississippi Code Annotated § 99-19-105 (Supp.1984), and, in any event, his death sentence is disproportionate with other comparable cases.

Part I of the Court's opinion, authored by Justice Sullivan, will discuss these assignments of error.

Part II, authored by Justice Dan Lee, will address Gray's assertion that the trial court erred in:

12. excluding a prospective juror for cause in violation of his right to trial by an impartial jury.

FACTS

Some time after midnight on June 3, 1982, Ronald Wojcik and Sandra Sowash were awakened and forced by knifepoint from Wojcik's Biloxi apartment by Attina Cannaday, David Gray, and Dawn Bushart. All five got into Wojcik's van and Cannaday drove to a remote wooded area north of Gulfport.

On the way, Gray raped Sowash at knifepoint in the rear of the van.

After the van stopped, Cannaday told Wojcik to get out. When he hesitated, Gray pulled him out. Holding a butcher knife to Wojcik's back, Gray marched him 50 to 60 feet into the woods. Cannaday yelled "Kill him", and Gray yelled back for Cannaday to bring Sowash into the woods to him.

Sowash turned and ran down the road. Cannaday threw her knife at Sowash but the handle hit her in the back. Sowash hid at a nearby house, while Cannaday, Gray and Bushart fled to Slidell, Louisiana. At sunrise, the body of Ronald Wojcik was found with 19 stab wounds to the head, hands, upper body, and back.

Gray stated that after he yelled for Sowash to be brought out, Wojcik hit him. Dropping the knife, Gray had a fist fight with Wojcik in which Gray knocked him to the ground, breathless. Picking up the knife, Gray suddenly saw Cannaday who asked for the knife and said she wanted to talk to Wojcik. Gray did so, telling her to say what she had to, but to make it fast. Gray then returned to the road. About five minutes later, Cannaday returned. He asked her what happened, and she replied, "Nothing, he got up and ran off." Gray denied using the butcher knife against Wojcik at any time during or after the fight. He said Cannaday did not return with the butcher knife. He likewise denied ever using either of the folding knives in his possession against Wojcik.

Sowash gave the police a detailed description of Wojcik's white van, as well as the name of Tina as a participant. Sheriff's deputies knew that Cannaday had connections in Slidell, Louisiana, and informed the Louisiana authorities to be on the lookout for the white van and occupants. Wojcik's wallet was found on the highway near Slidell.

Wojcik's van was sighted near Slidell, and Gray and one Timmy Page were arrested. Cannaday was arrested at Page's residence.

LAW

PART I

SULLIVAN, Justice, for the Court:

A. GUILT PHASE

1. REFUSAL TO SUMMON PRISONERS

Gray argues that the trial court's refusal to order the return of prisoners Halbert and Breland from Parchman to testify in his behalf violated his right under Mississippi Constitution Article 3, § 26, and United States Constitution Amendment VI, that in all criminal prosecutions the accused shall have the right "... to have compulsory process for obtaining witnesses in his favor...." See *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Gray filed a motion three days prior to trial requesting an order to return the two prisoners. The morning of trial, he offered in support of his motion a letter from Halbert stating that a prisoner (identified by defense counsel as Breland) was told by Cannaday while they were in the Biloxi jail that she had tried to cut off Wojcik's head. Gray argues that the sole basis for the trial judge's refusal was the expense of transporting the prisoners from Parchmen to the Gulf Coast.

The trial judge did refer to the expense of transferring prisoners in ruling on this motion, but the primary basis for overruling Gray's request was that the testimony of Breland as to what Cannaday told him would be inadmissible hearsay if offered to prove the truth of the fact asserted. *Murphy v. State*, 453 So.2d 1290, 1293-94 (Miss.1984). Also, any testimony by Halbert as to what Cannaday told Breland would be double hearsay, unless each link fits under an exception to the hearsay rule. *Id.* at 1294.

The judge recognized that if Cannaday took the stand as a witness, waived her Fifth Amendment right to remain silent, and denied that she took part in the murder, then Breland's testimony that she said she cut off Wojcik's head might have been admissible to impeach her testimony as a prior inconsistent statement. Therefore, the trial judge ruled that, if the proper predicate were laid for impeaching Cannaday, he would reconsider his ruling on the motion to transfer. The trial judge also was made aware that Breland had discussed the matter with defense counsel and said that, if brought back, he would not testify. At trial, Cannaday was called by Gray to testify but she invoked the Fifth Amendment right to remain silent on all matters concerning the murder.

[1, 2] The trial judge's refusal to order the attendance of the two prisoners was based on the lack of a colorable need for them to be summoned. The court correctly foresaw the fact that Cannaday, whose trial followed Gray's, would choose to remain silent, so that no basis arose for Halbert and Breland to be summoned to give their otherwise inadmissible testimony. Even so, the trial court left its ruling open for reconsideration in the event that Cannaday's testimony allowed for impeachment. It has been observed that the accused's right to compulsory process is not absolute and the state may require a showing of some colorable need for persons to be summoned lest the right be abused. *Passman v. Blackburn*, 652 F.2d 559, 566 (5th Cir. 1981). The motion to return Halbert and Breland from Parchman was addressed to the trial court's sound discretion, and we cannot conclude that Gray has demonstrated that the court's ruling was so fundamentally unfair as to deprive him of due process of law. *See United States v. Wilson*, 732 F.2d 404, 412 (5th Cir.1984).

Gray's reliance on *Gradsky v. State*, 243 Miss. 379, 137 So.2d 820 (1962), is misplaced. In that case we held that a defendant may summon his own attorney to give evidence vital to his defense, even though it may cause the lawyer embarrassment or raise the appearance of an ethical violation. Unlike *Gradsky*, *supra*, the admissibility of evidence which Gray sought to introduce through the prisoners was contingent upon the laying of a proper predicate which failed to materialize. This assignment of error is without merit.

2. STATE IMPEACHING ITS OWN WITNESS

Gray argues that the state's use of prior statements to impeach its own witness, Timothy Page, was improper because it was not shown that Page's testimony took the state by surprise nor that Page was unexpectedly hostile. *Moffett v. State*, 456 So.2d 714 (Miss.1984). In *Moffett*, we affirmed that a party is prohibited from impeaching his own witness with a prior statement when he knows reasonably well in advance that the witness has repudiated the statement. *Id.* at 718-19. Applying the standard in *Hall v. State*, 250 Miss. 253, 165 So.2d 345 (1964), we concluded that the state was not genuinely taken by surprise by witness Johnson's repudiation of his prior statement nor was Johnson unexpectedly hostile. *Id.*

In this case, Timothy Page was summoned from Louisiana by the state to testify against Gray about the events from the time of the arrival of the three suspects at Page's Slidell home until his arrest while riding with Gray in Wojcik's white van.

On direct examination, Page testified that he noticed Gray had a skinned place on his hand, some "bad things on his knuckles" and a little blood on his elbow. Gray told Page that he got in a fight with a couple of men in a bar in Mississippi. Toward the end of direct examination, the state asked Page numerous leading questions, to which Page gave unresponsive answers. The state persisted, and Gray's objection to leading questions was sustained. The state asked Page if he remembered giving a statement. Gray objected to the state impeaching its own witness. The trial court sustained this objection and overruled the state's plea of surprise.

On redirect, the state returned to the leading form of questioning and pursued the matter of Gray's fight in a bar. Page said that all Gray said was he whipped them. The state asked, "Didn't he brag to you about ...?", at which point Gray objected to the state continuing to lead its witness. The trial court sustained the objection and overruled requests to treat Page as a hostile witness. The state asked how Gray was acting, to which Page replied, "He was, uh, acting like nothing happened." The state offered to refresh Page's memory with his statement, to which defense counsel objected but the court let the state show Page this statement. Page said he recalled making the statement. Asked to read the statement, Page replied that he could not read. The state then asked Page if he made the following statement. Defense counsel's objection was overruled. The state read Page the following:

> Q. Was there anything about David that seemed strange?
>
> A. Yes, sir. When David handed me a drink of Jack Daniel's from the bottle, I don't remember which arm it was, but he had dried blood on his arm, just below his hand. And the opposite hand, his knuckles were skinned. It looked like to me he had cut his hand, hitting someone in the mouth or teeth. I asked him what had happened. And he said he had got into a fight somewhere in Mississippi with two dudes, and he was bragging about how bad he was ...
>
> Q. Anything you would like to add, at this time?
>
> A. The dude, David, was real nervous. And when I was looking around, he didn't want me to look around too much inside of the van.

Page acknowledged making that statement and admitted that Gray appeared shaky. The state attempted to further question Page regarding his prior statement but the court refused to sustain the plea of surprise, because Page had been in the district attorney's office for two days. The prosecutor responded, "I didn't know he would lie. I thought he would testify like his statement." The judge on his own motion told the jury to disregard the district attorney's remarks.

In this case the trial court ruled that the state could not treat Page as a hostile witness, but in fact allowed the prosecutor to use Page's prior statement to the police to impeach his earlier assertion that Gray was acting like nothing had happened.

Gray contends that there could be no true surprise since the state had two days in which to question Page concerning his statement and did not do so. Gray further complains that after the trial court ruled adversely to the state, the prosecutor accused Page of being a liar in the presence of the jury. Gray contends that the witness's prior statements had a prejudicial effect on his sentencing determination and require reversal under *Cannaday v. State*, 455 So.2d 713 (Miss.1984).

[3] We will first lay to rest the question of the prosecutor's remark. While the remark was improper, the trial judge corrected the matter instantly by admonishing the jury to disregard the comment. *Ratliff v. State*, 317 So.2d 403, 405-06 (Miss.1975); *Clanton v. State*, 279 So.2d 599 (Miss. 1973).

[4] This case can be distinguished from *Moffett*, *supra*, on its facts in that this record contains no indication that the witness Page ever informed the state or defense counsel that he would not testify in accordance with the statement he had given the police in Slidell. Indeed, it would have been surprising if the illiterate Page

had informed anyone that he intended to testify differently from a statement which he could not read. We look now to *Hall v. State, supra*, to determine whether the prosecutor was surprised and the witness unexpectedly hostile. In the absence of any indication to the contrary, the state may genuinely not have expected Page to be hostile since he was a friend of Cannaday, not Gray. Page proved to be less than cooperative during his direct examination by the state, and the leading questions were due in part to Page's non-responsive answers. When, on redirect, Page said that Gray was acting like nothing happened, the state may genuinely have been surprised given the strength of his earlier statement that Gray was acting "real nervous" and did not want Page looking around in the van. Thus the state laid a predicate to impeach Page as an unexpectedly hostile witness.

Even were this not so, Page's trial testimony and out-of-court statement both corroborated Gray's version of the story, when Gray himself took the stand and testified. In fact, Page's testimony concerning Gray's fist fight would not have prejudiced Gray but rather bolstered his defense.

Gray's assertion that Page's statement that Gray bragged "about how bad he was" unduly prejudiced the jury pales when compared with his co-defendant's admission, ruled inadmissible on appeal, that she tried to break off Wojcik's head. *Cannaday, supra*, at 721. We conclude that the state laid a predicate for impeaching Page with his prior statements and, even were this not so, the statements were not so inflammatory as to infect the sentencing phase of his trial. *Cannaday, supra*, at 724.

3. COMMENT ON GRAY'S RIGHT TO REMAIN SILENT

The incident in question occurred while the state was questioning Officer Joe Kennedy, of the St. Tammany Parish sheriff's department, concerning his arrest of Gray:

After you advised them both of their rights, did you have occasion to ask either one of them or, in particular, David Gray, any questions?

A. The only thing I asked Gray was, uh, about the ownership of the vehicle.

Q. And did he respond to that question?

A. He indicated that the van belonged to his girl friend.

Q. Okay.

Did he say anything further to you?

A. He went on to state to me that, uh, that he knew his rights and he wasn't going to say anything. I told him....

BY MR. STEGALL:

(Interposing) If it please the Court, I'm going to object to that and ask to approach the Bench.

BY THE COURT: I sustain your objection.

Gray moved for a mistrial on the ground that the witness's testimony constituted a comment upon his exercise of his Fifth Amendment right to remain silent. The court overruled the motion. Gray did not request nor was he given a curative instruction at that time. In arguing that his death sentence should be vacated for improper comment on his failure to offer sworn testimony, Gray argues that we should follow our holding in *Williams v. State*, 445 So.2d 798 (Miss.1984). This contention is based on a misunderstanding of our holding in *Williams*. The defendant in *Williams* was allowed to make an unsworn opening statement and the prosecutor commented to the jury in closing on the defendant's failure to give his version of the facts while under oath. We held in that case that it was not necessary to hold that this error standing alone constituted reversible error. Instead, we considered the combined influence of this error with two other improper comments by the prosecutor concerning appellate review and the possibility of parole. Taken together, we then held that their aggregate effect was to deny Williams a fair sentencing hearing. *Id.* at 801.

[5, 6] Evidence of post-arrest silence violates due process because it is fundamentally unfair to afford a suspect the right to remain silent and yet allow implications of his silence to be used against him. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). However, we recognized in *Austin v. State*, 384 So.2d 600, 601 (Miss.1980), that a prosecutor's comment about a defendant's silence, though improper, was harmless error in view of the overwhelming evidence of guilt beyond reasonable doubt. See *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In this case, the single reference by the witness to Gray's intention to remain silent was neither repeated nor linked with Gray's exculpatory statement. Moreover, the trial judge charged the jury at the conclusion of trial that no adverse inference may be drawn by the invocation of the right to remain silent by a witness or an accused. These factors, together with the overwhelming evidence of guilt beyond reasonable doubt, lead us to conclude that the improper comment in this case was harmless error. *Austin v. State, supra, Chapman v. California, supra.*

Gray's invocation of *Williams v. State, supra*, is unpersuasive in that it was not solely the improper prosecutor's comment, but the aggregate effect of several distinct improper arguments that required reversal of Williams' sentencing phase. This assignment of error is without merit.

4. FAILURE TO DEFINE ELEMENTS OF KIDNAPPING

[7] The state did not offer nor did Gray request an instruction defining the elements of the underlying felony which elevates this murder to capital murder. *See* Miss.Code Ann. § 97-3-19(2)(e) (Supp. 1984). During the course of his testimony, Gray admitted to the forcible seizure and concealment of Sowash and Wojcik against their will. *Cf.* Miss.Code Ann. § 97-3-53 (Supp.1984) (kidnapping). Gray argues that the trial court's failure to instruct the jury regarding the elements of kidnapping denied him due process of law in that the jury could not determine his guilt or innocence of the crime charged unless given some legal guidance as to what are the elements of the crime of kidnapping. The absence of legal guidance, according to Gray, makes the jury's finding of guilt unreliable, contrary to the high level of reliability required in capital cases. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

There is no merit to this assignment of error because Gray makes no objection to the instructions offered by the state and, more importantly, failed to submit an instruction to the trial judge on the elements of kidnapping. The combined failure to object or to request an appropriate instruction operates to waive any objection on this issue. *Billiot v. State*, 454 So.2d 445, 462 (Miss.1984); *Gilliard v. State*, 428 So.2d 576, 583 (Miss.1983). This assignment of error is without merit.

5. FAILURE TO INSTRUCT THAT SIMPLE MURDER WAS LESSER INCLUDED OFFENSE

[8] The trial court was never requested to instruct the jury on the lesser included offense of simple murder. *Newell v. State*, 308 So.2d 71 (Miss.1975), holds that the trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so. *Id.* at 78. This rationale has been applied by this Court in death penalty cases. *Gilliard v. State*, 428 So.2d 576, 583 (Miss.1983). We cannot conjecture that the trial court would have refused Gray's proffered instruction on simple murder, had one been offered to him. There is no merit to this assignment.

6. REFUSAL TO INSTRUCT THAT MANSLAUGHTER AND KIDNAPPING WERE LESSER INCLUDED OFFENSES

During discussion of the jury instructions, Gray's attorney asked the court to permit him to draft a manslaughter instruction for submission as a lesser included offense on the ground that the jury

could consider Gray's story to be true that he fought Wojcik and killed him in the heat of passion but without malice. The court ruled that even if defense counsel had it ready, it would not be granted under the facts of this case.

Gray argues that his testimony that Wojcik hit him and they engaged in a fist fight offers the basis for presenting to the jury the affirmative proposition that his actions were "without malice aforethought" and in the heat of passion. The state responds that, even taking the evidence in the light most favorable to Gray, there is no way that it could be said to support a finding that Gray killed Wojcik without malice aforethought and in the heat of passion. Gray armed himself and two others, abducted two people at knifepoint, took them into the woods north of Gulfport, led Wojcik into the woods at knifepoint, and then, accepting Gray's testimony, beat Wojcik to the ground breathless. He then supplied the knife to Cannaday and left Wojcik to her tender mercies.

A comparison of this case with *Lanier v. State*, 450 So.2d 69 (Miss.1984), demonstrates what sort of proof must be shown in order for a manslaughter instruction to be an appropriate lesser included offense. Lanier's confession indicated that he was accosted by a policeman late at night and made to remove all of his personal belongings from a bag. The officer having drawn his gun, reacted when Lanier removed his own weapon from the bag and the officer fired at Lanier. Lanier returned fire, hitting him. Certain physical evidence corroborating Lanier's confession was held to be sufficient to submit to the jury the question of whether Lanier, surprised by the police officer, killed him without malice aforethought and in the heat of passion. *Id.* at 79–81.

[9, 10] The well settled law in this state is that jury instructions are not given unless there is an evidentiary basis for such in the record. *Colburn v. State*, 431 So.2d 1111, 1114 (Miss.1983); *Fairchild v. State*, 459 So.2d 793 (Miss.1984). In our opinion, there is no evidentiary basis in the record for concluding that Gray acted in the heat of passion and without malice aforethought. Gray's entire testimony in the record is that he never stabbed Wojcik. If, by submitting the issue of manslaughter, Gray admits that he stabbed Wojcik, there does not appear to be anything in the record that changes the character of that killing from its malicious and premeditated origin. *See Fairchild v. State, supra*, at 801–02 (Miss.1984). The trial court correctly rejected Gray's request for a manslaughter instruction.

As for Gray's requested instruction D–13 which would have permitted the jury to find him not guilty of capital murder but guilty of kidnapping, this Court resolved this precise issue involving an identical jury instruction against, Gray's co-defendant in *Cannaday v. State*, 455 So.2d at 724. We noted that murder and manslaughter may be lesser included offenses of capital murder, but kidnapping is not. *Id.* at 725. Therefore, there is no merit to the assignment that the trial court erred in refusing to grant the lesser included offense instruction on kidnapping.

7. REFUSAL OF CERTAIN CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS

[11] Instruction D–4 told the jury that it does not have the right to convict upon mere suspicion nor upon the preponderance of the evidence but only upon evidence that he was guilty beyond all reasonable doubt and to a moral certainty and to the exclusion of every reasonable hypothesis consistent with innocence. The court refused this instruction and instead granted instruction C.13SC which informed the jury that the law presumes the defendant to be innocent and places the burden upon the state to prove him guilty of every material element of the crime beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence.

Instruction D–5 cautioned the jury not to indulge in speculation, conjecture, or guesswork. Further it instructed the jury that where there is a controverted issue of fact and the testimony fails to show beyond all reasonable doubt that the state's contention in regard to that issue is true, then the presumption of innocence controls. Instead, the court granted instruction C–1 which also informed the jury that its verdict should be based on the evidence and not upon speculation, guesswork or conjecture. The court also granted instruction D–8, which provided that if there are facts in the case susceptible of two interpretations, one favorable and the other unfavorable to the accused, and if there is a reasonable doubt as to the correct interpretation, then the jury must resolve the doubt in favor of the accused.

Finally, the court refused instruction D–11, which informed the jury that it did not have to explain its verdict to a living soul and that a verdict of acquittal will not mean that the jury is convinced of Gray's innocence but only that a reasonable doubt remains in their minds.

It is well settled in this state that where defendant's instructions on circumstantial evidence are properly covered by other instructions given by the court, the trial court will not be put in error for refusing to grant other instructions on the same point using alternative language. *Bullock v. State*, 391 So.2d 601 (Miss.1980); *Jones v. State*, 381 So.2d 983, 991 (Miss.1980).

A very strong circumstantial evidence instruction was granted to Gray and read to the jury which accomplished essentially the same thing that any of the other refused instructions would have done. There was no error in refusing to grant the other circumstantial evidence instructions. We have carefully reviewed all of the assignments of error offered by Gray affecting the guilt phase of his trial and we find that none of them are meritorious. We, therefore, affirm the conviction of David Randolph Gray for the crime of capital murder.

B. SENTENCING PHASE

8. ADMISSION OF ARREST AND PROBATION REVOCATION FORMS

[12] The state introduced into evidence at the sentencing hearing a commitment paper from Jones County indicating that Gray had been convicted of aggravated assault upon a law enforcement officer and had been placed on probation for three years. Attached to the commitment paper were the arrest warrant and probation revocation forms which indicated that he had commited another unnamed violation of law. Defense counsel objected to introduction of the order of the circuit court because of the additional writing on the bottom. This referred to the fact that the commitment paper indicated that Gray's probation was revoked and his three-year sentence was reinstated.

Gray argues that this evidence should not have been admitted at trial under the rule that proof of a crime different from that alleged in the indictment is not submissible against the accused. *Gray v. State*, 351 So.2d 1342, 1345 (Miss.1977); *West v. State*, 463 So.2d 1048 (Miss.1985). In *West*, we held it to be error for the jury to see during the sentencing phase a copy of the defendant's Georgia conviction which recited that he had been found guilty of capital murder and sentenced to death. We found that this information impermissibly lessened the burden upon the jury as to whether their verdict was the only final determination on the question of whether the death penalty would be imposed upon West. *Id.* at 1052–53.

Gray further argues that the introduction of the probation revocation evidence was irrelevant to any of the aggravating circumstances the state was allowed to prove and was prejudicial because it suggested that Gray had committed other crimes. Gray further argues that he was not represented by counsel at the probation revocation hearing and, therefore, his Sixth Amendment right to counsel was violated.

The papers in question only showed that Gray did eventually serve time for the aggravated assault conviction, but do not reveal the crime for which his probation was revoked. Furthermore, the inference that Gray had committed another unnamed

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crime could not have prejudiced him in any way differently from his own admission from the witness stand of convictions for aggravated assault, grand larceny, and cattle theft. Gray admitted to the jury that he served around 28 months in prison and was last paroled from the penitentiary in August of 1981.

Gray's situation is readily distinguishable from *West v. State*, *supra*, because nothing in the probation revocation forms indicated that Gray had already been sentenced to death, so that their admission could not have lessened the jury's burden in returning a second death sentence. The state properly points out in its argument that this record is completely silent as to whether Gray was represented by counsel at the probation revocation hearing and this Court will not act on such naked assertions.

9. INCLUDING PECUNIARY GAIN AS AN AGGRAVATING CIRCUMSTANCE

[13] Under this assignment, Gray argues that there was a "doubling up" of aggravating circumstances when the trial court instructed the jury that it could consider both whether the murder was committed for pecuniary gain and whether it occurred during the course of the kidnapping. Gray contends that these two aggravating circumstances arose from the same aspect of the crime. This question has been decided adversely to Gray in *Jordan v. State*, 464 So.2d 475, 478–79 (Miss.1985), *Irving v. State*, 441 So.2d 846 (Miss.1983); *Hill v. State*, 432 So.2d 427 (Miss.1983); *Gilliard v. State*, 428 So.2d 576 (Miss. 1983); and *Smith v. State*, 419 So.2d 563 (Miss.1982). In *Henry v. Wainwright*, 721 F.2d 990 (5th Cir.1983), the Fifth Circuit Court of Appeals rejected this same constitutional argument holding that resolution of the issue was a question of state law.

There is no merit to this assignment of error.

10. INSTRUCTIONS REQUIRING ENMUND FINDINGS

[14] *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) construed the Eighth Amendment to forbid imposition of the death penalty against "one who neither took life, attempted to take life, nor intended to take life". *Id.* at 786, 102 S.Ct. at 3371. Gray claims that his death sentence must be set aside because there was neither a finding nor sufficient evidence to support a finding that he killed or intended to kill Wojcik in the course of the kidnapping. Gray's conviction occurred prior to the amendment of the Mississippi Death Penalty statute to require the jury to make *Enmund* findings. *See* Miss.Code Ann. § 99-19-101(7) (Supp.1984).

Instruction S-1 at the guilt phase required the jury to make *Enmund* findings because in order to find Gray guilty the jury had to believe from the evidence beyond a reasonable doubt that Gray did "unlawfully, wilfully, and feloniously and *of his malice aforethought* kill and murder ... Ronald Wojcik, while engaged in the commission of the crime and felony of kidnapping." (emphasis added) Also, instruction S-3 told the jury that malice aforethought "is a predetermination to commit an act without legal justification or excuse." *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir.1982), holds that the "intent to commit" murder standard was met where identical instructions were given to those in the case *sub judice*. There the Court found that the charge to the jury that it could not convict appellant absent a finding that he intended to commit murder meant that the jury's verdict could be read only to reflect such a finding. *Id.* at 1076–77. The testimony of Gray reflected that Cannaday asked Gray to get some knives and come with her to help scare her ex-boy friend, Wojcik. Gray said that she asked him to kill Wojcik; he said he would help her scare Wojcik but would not kill him. Gray claimed that after he marched Wojcik at knifepoint into the woods, he was going to scare Wojcik and tell him to run. When they got into a fight, Gray punched Wojcik as hard as he could. Then, handing his butcher knife to Cannaday, Gray left.

In *Jones v. Thigpen*, 741 F.2d 805 (5th Cir.1984), the Fifth Circuit reversed the defendant's conviction because there was no evidence indicating that the defendant killed or assisted his accomplice in killing the victim, or that he supplied the murder weapon, or even that he knew his accomplice intended that a killing occur. In that case, the Fifth Circuit said that, had the state introduced such evidence, the death penalty would not be disturbed. 741 F.2d at 817. In this case, Gray admitted that Cannaday told him she wanted Wojcik killed and that he, Gray, supplied Cannaday with the murder weapon after disabling the victim. This admission by Gray establishes the requisite personal culpability under *Enmund v. Florida*, and there is no merit to this assignment of error.

11. SUFFICIENCY OF PROPORTIONALITY REVIEW

[15] We are urged by Gray that Mississippi Code Annotated § 99-19-105(3)(c) (Supp.1984), requires us to compare his death penalty with all capital murder cases, even though a life sentence is imposed and whether or not the case was even appealed to this Court. Gray further argues that we should compare appealed capital convictions where a life sentence was imposed with cases where the death penalty was imposed. Gray contends that a detailed examination and review of all capital murder cases is necessary to achieve the justice that the proportionality requirement envisions. We reject this contention. In *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), the Supreme Court of the United States held that such a review is not constitutionally mandated, being exclusively a question of state law. In *Gray v. Lucas*, 677 F.2d 1086 (5th Cir.1982), the Fifth Circuit said:

> Gray claims that the Mississippi Supreme Court's comparative review of death sentences is flawed since the Court only compared Gray's case with those cases where the death sentence had been imposed and not with all the cases where it could have been imposed. Because the Supreme Court has rejected a similar argument in *Proffitt v. Florida*, 428 U.S. 242, 258–59 fn. 16, 96 S.Ct. 2960, 2969–70 fn. 16, 49 L.Ed.2d 913 (1976), we reject this claim as well.

677 F.2d at 1111.

We find no basis in this assignment of error and it is rejected.

PART II

DAN M. LEE, Justice, for the Court:

12. EXCLUDING A PROSPECTIVE JUROR FOR CAUSE, IN VIOLATION OF HIS RIGHT TO TRIAL BY AN IMPARTIAL JURY

It may correctly be said that the right of an accused to be tried by a jury of his or her peers is the foundation of fairness and the hallmark of our judicial system. U.S. Const. Amend. VI; Miss. Const. art. III § 26. This Court and the United States Supreme Court have frequently written of the significance of the jury's role. See, *Fuselier v. State*, 468 So.2d 45 (1985); *Wiley v. State*, 449 So.2d 756 (Miss.1984); *Sanders v. State*, 440 So.2d 278 (Miss.1983) and *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). In fact, the jury is so engrained in our notion of a trial that it has become the subject of great drama such as Reginald Rose's Twelve Angry Men. Unfortunately the common place acceptance of the jury system sometimes results in taking that right for granted, making the importance of the jury's role not as readily appreciated by those who do not have a direct stake in the outcome of the proceedings. Every trial lawyer and judge is well aware of the difficulties posed by citizens reluctant to give of their time and attention to help administer our system of justice. It was just such reluctance which presented the trial court with some troublesome decisions in the instant case.

The voir dire of a jury is important in any case but especially so where the state seeks to impose the death penalty. The nature of the penalty and the strong per-

sonal convictions of many prospective jurors have resulted in voir dire proceedings unique to capital cases. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, 9 Ohio Ops.3d 26 (1978); *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Wainwright v. Witt*, — U.S. —, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

In *Armstrong v. State*, 214 So.2d 589 (Miss.1968) this Court attempted to provide guidelines by which our trial courts could follow the dictates of *Witherspoon*:

> The proper method of bringing the death penalty to the attention of the special veniremen is for the trial judge to inform them that they have been summoned as veniremen in a capital case and that a verdict of guilty could result in the infliction of the death penalty. The judge should then ask them if any member of the panel has any conscientious scruples against the infliction of the death penalty, when the law authorizes it, in proper cases, and where the testimony warrants it. If there are those who say that they are opposed to the death penalty, the trial judge should then go further and ask those veniremen, who have answered in the affirmative, whether or not they could, nevertheless, follow the testimony and the instructions of the court and return a verdict of guilty although that verdict could result in the death penalty, if they, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict. Those who say that they could follow the evidence and the instructions of the court should be retained, and those who cannot follow the instructions of the court should be released. The mere fact that a veniremen is opposed to the death penalty does not disqualify him as a juryman, if he can do his duty as a citizen and juror and follow the instruction of the court, and where he is convinced of the defendant's guilt he can convict him although the verdict of the jury may result in the death penalty's being inflicted upon the defendant.

214 So.2d at 593.

[16, 17] Although the United States Supreme Court has refined the *Witherspoon* decision in *Adams*, the issue remains the ability of the prospective juror to follow the instructions and the juror's oath. The proper method of determining whether the prospective juror can do that is still for the *judge* to follow the procedure outlined in *Armstrong*. Unfortunately that did not occur in the present case and that failure ultimately combined with some prospective jurors' reluctance to serve to create the difficulties we now face.

The Harrison County District Attorney conducted the majority of the death penalty voir dire, with the circuit judge participating only when the questions and responses of Mrs. Bounds became so tangled that everyone involved admitted to being confused. That problem notwithstanding, the groundwork for Mrs. Bounds' removal was laid long before any questions were asked of her.

When the voir dire began several jurors expressed the sentiment that they had conscientious scruples against the death penalty and could not vote to inflict it under any circumstances. The trial judge refused to excuse those jurors for cause and required the state to exercise peremptory challenges to them. It is abundantly clear from the record that his reason for doing so was because he believed that the jurors were simply claiming to have concientious scruples against the death penalty so that they could be released from jury service.[1] Confronted by what he believed to be insincere attestations of personal moral convictions, the trial court was unwilling to dismiss those jurors for cause even though their responses clearly indicated that they could

1. This certainly highlights the problems that can be encountered when the trial court rules on each juror immediately after that juror's voir dire and in the presence of the other prospective veniremen. Jurors who wish to be excused are quick to learn what responses will get them excused. Such a procedure is not good practice and should be avoided.

properly be so dismissed both under *Witherspoon* and *Adams*.

By the time Mrs. Bounds was voir dired the state had already been forced to use all of its peremptory challenges. As stated above, Mrs. Bounds' voir dire was lengthy and confusing. Nonetheless she positively stated several times that she could vote for the death penalty should the circumstances warrant it. Although her responses were at times equivocal, she was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria. *See Fuselier, supra.*

Because of Mrs. Bounds' equivocation the state sought to excuse her and complained that the trial court had erroneously forced it to use all of its peremptory challenges. The trial judge responded by saying:

> Well, I think that's right. I made you use about five of them that didn't equivocate. Uh, I never had no idea that we'd run into this many.

The trial judge then directed the prosecutor to resume questioning Mrs. Bounds in an effort to get an unequivocable response. She again replied that she could vote for the death penalty. The state then again requested that she be dismissed for cause. The court then ruled as follows:

> (BY THE COURT: (Interposing) I should have questioned them on this, I guess.....
>
> (BY [DISTRICT ATTORNEY]: (Unable to distinguish Mr. Necaise's remarks as the Court continued talking, at the same time.)
>
> (BY THE COURT: ..... but I never had no idea it was going to.....
>
> (BY [DEFENSE COUNSEL]: (Interposing) Disregarding the evidence.....
>
> (BY THE COURT: ..... wind up in a mess like this. I'd hate to get a conviction and get it reversed because of this one woman. She can't make up her mind.
>
> Well, let the record show that the Court is of the firm opinion that there was at least five, even though I think there's around nine challenges been used by the District Attorney for cause, either eight or nine, all right, there was eight of them that had said that they were against Capital Punishment.
>
> And I think there was, uh, five of those that were unequivocally opposed to it and answered, in subetance, if not even stronger language than the question set forth in the Witherspoon case, uh, from the United States Supreme Court, uh, that I should, at this point, allow him to challenge this lady for cause. She is totally indecisive. I think she is totally indecisive. She says one thing one time and one thing another.
>
> The Court is of the opinion that it cheated the State by making him, uh, use, uh, by making the District Attorney use his peremptory challenges in at least five instances. And I'm going to allow it in this particular case.
>
> (BY [DEFENSE COUNSEL]: Excuse her for cause?
>
> (BY THE COURT: I'm going to excuse her.
>
> (BY [DEFENSE COUNSEL]: Let me ask the Court this, is the Court of the opinion that, uh, that there has been a sufficient record.....
>
> (BY THE COURT: (Interposing) I'm not going to add any to his challenges.
>
> (BY [DEFENSE COUNSEL]: Okay. All right.
>
> (BY THE COURT: I'm not going to go back and give him five more. I'm going to excuse her for cause.
>
> (BY [DEFENSE COUNSEL]: Okay. All right.)
>
> (BY THE COURT: You can go, Mrs. Bounds, and call back tomorrow afternoon.

Although the route taken to Mrs. Bounds' dismissal was a circuitous one indeed, and most highly disfavored, it should be obvious to all that no prejudice occurred to the defendant Gray. The force and effect of the trial court's ruling was to correct an error he had committed in refusing to dismiss other jurors for cause after they had unequivocably stated that they could

not vote to impose the death penalty in any circumstance. Certainly the state is entitled to a jury that can follow the instructions and juror's oath. *Adams, supra; Witt, supra.* That being the case the trial court was correct when it recognized the error in its prior rulings and took affirmative action to correct that error. We have recognized in numerous cases that a trial court should be afforded the opportunity to correct any errors at trial by way of a motion for a new trial. *House v. State*, 445 So.2d 815, 819 (Miss.1984); *Read v. State*, 430 So.2d 832, 838 (Miss.1983); *Johnson v. State*, 404 So.2d 553, 556 (Miss.1981); *Tribbett v. State*, 394 So.2d 878, 880–81 (Miss. 1981).

There is no logical reason not to allow the trial court in this situation to correct its erroneous ruling prior to the empanelling of the jury and termination of trial. Notions of judicial economy make it clear that the trial court should be allowed to recognize and correct its error early in the proceedings, especially where as here, there could have been no possible prejudice to the defendant. That being the case, we find no merit to Gray's final assignment of error.

[18] Finally, we have closely examined the record in the instant case and unequivocably find that Gray's murder of Wojcik warranted the death penalty. A comparison of this case with our cases decided after *Jackson v. State*, 337 So.2d 1242 (Miss.1976), in which the death penalty has been imposed and upheld reveals that such penalty is neither wanton, freakish, excessive, nor disproportionate to the sentences imposed in those cases. (See Appendix "A") His execution would be consistent and even handed with all the post-*Jackson* cases previously affirmed by us.

Based on all of the foregoing, we hereby affirm DAVID RANDOLPH GRAY'S verdict of guilty and sentence of death. That sentence is to be carried out in the manner prescribed by law on the 26th day of June, 1985.

AFFIRMED.

AS TO PART I: All Justices concur.

AS TO PART II: WALKER and ROY NOBLE LEE, P.JJ., and HAWKINS, PRATHER and ANDERSON, JJ., concur as to Part II.

PATTERSON, C.J., and SULLIVAN and ROBERTSON, JJ., dissent as to Part II.

APPENDIX "A"

DEATH PENALTY CASES AFFIRMED BY THIS COURT:

Johnson v. State, — So.2d —, No. 55,265, decided May 8, 1985, (not yet reported);

Cabello v. State, 471 So.2d 332 (Miss. 1985);

Jordan v. State, 464 So.2d 475 (Miss. 1985);

Wilcher v. State, 455 So.2d 727 (Miss. 1984), and 448 So.2d 927 (Miss.1984);

Stringer v. State, 454 So.2d 468 (Miss. 1984);

Billiot v. State, 454 So.2d 445 (Miss. 1984);

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Booker v. State, 449 So.2d 209 (Miss. 1984);

Caldwell v. State, 443 So.2d 806 (Miss. 1983);

Irving v. State, 441 So.2d 846 (Miss.1983) and 361 So.2d 1360 (Miss.1978);

Tokman v. State, 435 So.2d 664 (Miss. 1983);

Leatherwood v. State, 435 So.2d 645 (Miss.1983);

Hill v. State, 432 So.2d 427 (Miss.1983);

Pruett v. State, 431 So.2d 1101 (Miss. 1983);

Gilliard v. State, 428 So.2d 576 (Miss. 1983);

Evans v. State, 422 So.2d 737 (Miss. 1982);

APPENDIX A—Continued

King v. State, 421 So.2d 1009 (Miss. 1982);

Wheat v. State, 420 So.2d 229 (Miss. 1982);

Smith v. State, 419 So.2d 563 (Miss. 1982);

Johnson v. State, 416 So.2d 383 (Miss. 1982);

Edwards v. State, 413 So.2d 1007 (Miss. 1982);

Bullock v. State, 391 So.2d 601 (Miss. 1980);

Roddie v. State, 391 So.2d 999 (Miss. 1980);

Jones v. State, 381 So.2d 983 (Miss.1980);

Culberson v. State, 379 So.2d 499 (Miss. 1979);

Gray v. State, 375 So.2d 994 (Miss.1979);

Jordan v. State, 365 So.2d 1198 (Miss. 1978);

Voyles v. State, 362 So.2d 1236 (Miss. 1978);

Washington v. State, 361 So.2d 61 (Miss. 1978);

Bell v. State, 360 So.2d 1206 (Miss.1978).

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT:

Edwards v. State, 441 So.2d 84 (Miss. 1983);

Dycus v. State, 440 So.2d 246 (Miss. 1983);

Coleman v. State, 378 So.2d 640 (Miss. 1979).

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY:

Mhoon v. State, 464 So.2d 77 (Miss.1985);

Cannaday v. State, 455 So.2d 713 (Miss. 1984);

Wiley v. State, 449 So.2d 756 (Miss.1984);

Williams v. State, 445 So.2d 798 (Miss. 1984).

SULLIVAN, J., dissenting:

The majority admits that it would be error for the trial judge to excuse venire member Bounds for cause since "she was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria". *Ante* at 421. We are told that her excusal did not violate Gray's right to an impartial jury because the trial judge was actually correcting a prior erroneous ruling which deprived the state of a peremptory challenge.

With all deference to the majority, it contradicts the trial judge's very words to rule that Bounds was removed by a peremptory challenge. Furthermore, the law does not sanction the attempt to exercise leftover peremptory challenges to cure a violation of a capital defendant's right to trial by an impartial jury.

The record could not more plainly reflect that the basis for excusing juror Bounds was not a peremptory challenge, but a challenge for cause. At the conclusion of the colloquy quoted by the majority, *ante* at 422–423, the trial judge said: "I'm not going to add any to his challenges ... I'm not going to go back and give him five more. I'm going to excuse her for cause." (TR at 555). Whatever may have been the "force and effect" of the trial court's ruling, he plainly stated that he was excluding venire member Bounds for cause.

The majority makes an appealing argument that the trial judge properly corrected a prior erroneous ruling concerning previous jurors who stated that they could not vote for the death penalty under any circumstances. The reason these jurors were originally excused, according to the majority, was that the trial judge believed that their answers were insincerely given in order to be released from jury service. If in fact these jurors were concealing an ability to serve on a capital murder case, then they could not any more be excused for cause consistent with *Adams* and *Witt* than Mrs. Bounds.

The underlying reasoning of the majority opinion is that excusal of juror Bounds for cause was harmless error since the trial judge, in effect, gave the state back a

previously exercised peremptory challenge. The problem is that *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976), requires us to conclude that dismissals for cause cannot be sanctioned as "harmless error", regardless of whether the state, at trial, could have peremptorily challenged the same juror. See *Burns v. Estelle*, 592 F.2d 1297 (5th Cir.1979), adhered en banc 626 F.2d 396 (5th Cir.1980), *Moore v. Estelle*, 670 F.2d 56 (5th Cir.1982), *Hance v. Zant*, 696 F.2d 940, 956 (11th Cir.1983); *Barfield v. Harris*, 540 F.Supp. 451, 465 (ED.N.C.1982); *Keeten v. Garrison*, 578 F.Supp. 1164, 1190 (WD N.C.1984); *Chandler v. State*, 442 So.2d 171, 175 (Fla. 1983); *Blankenship v. State*, 280 S.E.2d 623, 624 (Ga.1981); *overruling Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642 (1978); *Grijalva v. State*, 614 S.W.2d 420 (Tx.Cr. App.1980) *en banc overruling Chambers v. State*, 568 S.W.2d 313 (Tx.Cr.App.1978); *People v. Velasquez*, 26 Cal.3d 425, 162 Cal.Rptr. 306, 606 P.2d 341 (1980); *In Re Anderson*, 69 Cal.2d 613, 73 Cal.Rptr. 21, 447 P.2d 117 (1968).

The case law holding that there can be harmless error in *Witherspoon* cases, such as when the state has not used all of its peremptory challenges, represents extremely doubtful authority, as it fails to follow the absolute rule of reversal mandated by *Davis v. Georgia*, referred to by Justice Rehnquist in his dissent as a *per se* rule. *Davis* announces a clear rule mandating reversal and the following cases which fail to adhere to it are ignoring the authoritative construction of the United States Supreme Court of the Federal right to trial by an impartial jury. *State v. Nicholson*, 437 So.2d 849 (La.1983); *Gall v. Commonwealth*, 607 S.W.2d 97 (Ky.1980); *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979); *People v. Moore*, 42 Ill.2d 73, 246 N.E.2d 299 (1969).

In conclusion, there can be no doubt that juror Bounds was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria. The majority errs in holding that the trial judge did not excuse her for cause. Its attempts to justify the trial judge's error amount to a retroactive application of a peremptory challenge, clearly an unacceptable and unwise course to pursue in view of the clear authority to the contrary. I would rule that the trial court erred in excluding juror Bounds for cause, and this error requires reversal of Gray's death sentence for a new sentencing trial. See *Granviel v. Estelle*, 655 F.2d 673 (5th Cir.1981). I would adhere to the ruling in *Davis v. Georgia*, that a violation of *Adams* and *Witt* is *per se* grounds for reversal, and cannot be excused as harmless error.

PATTERSON, C.J., and ROBERTSON, J., join in this dissent.

Marc THOMAS and Harold Anderson

v.

STATE of Mississippi.

No. 55550.

Supreme Court of Mississippi.

June 12, 1985.

Defendants were jointly indicted for sale of controlled substance. One defendant pled guilty to sale of controlled substance and the other defendant pled guilty to possession of controlled substance, but subsequently, prior to sentencing, defendants filed motion to withdraw their previous pleas and substitute pleas of not guilty. The Circuit Court, Adams County, Edwin E. Benoist, Jr., J., denied the motion and defendants appealed. The Supreme Court, Dan M. Lee, J., held that: (1) trial court did not abuse its discretion in denying motion for withdrawal of guilty plea of either defendant, based upon finding that both pleas were knowingly and voluntarily entered; (2) fact that at the time defendants entered

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

DAVID RANDOLPH GRAY
Petitioner

VERSUS

STATE OF MISSISSIPPI
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
MISSISSIPPI SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL
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I. INTRODUCTION

This matter is before the Court on petition for writ of certiorari to the Mississippi Supreme Court seeking review of that Court's affirmance of the Petitioner's conviction and sentence of death. The Petitioner is proceeding in forma pauperis with the aid and assistance of counsel.

II. OPINIONS BELOW

The opinion of the Mississippi Supreme Court affirming the conviction and death sentence is reported as Gray v. State, 472 So. 2d 409 (1985).

III. JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3), asserting denial of rights secured by the United States Constitution.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner relies on the provisions of the Sixth Amendment and the Fourteenth Amendment to the United States Constitution. Petitioner was indicted and found guilty of capital murder pursuant to Miss. Code Ann. § 97-3-19 (1972, as amended) and sentenced to death by the jury after a separate hearing on the punishment pursuant to Miss. Code Ann. § 99-19-101 (1972, as amended).

V. STATEMENT OF THE CASE

Respondents accept the statement of the case set forth by the petitioner herein with the exception that the complete voir dire of juror Bounds is attached hereto as a portion of the appendix. The voir dire of juror Bounds is found at pages 529-555 of the record filed in the Mississippi Supreme Court.

VI. REASONS FOR DENYI'G THE WRIT

A. CERTIORARI SHOULD BE DENIED SINCE THE OPINION OF THE MISSISSIPPI SUPREME COURT MERELY CORRECTED AN ERROR OF THE TRIAL JUDGE

The situation which leads to the filing of this petition for certiorari was brought about by the failure of the trial judge to properly exclude jurors for cause at the request of the prosecution when such jurors clearly failed to meet the standards set forth in Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980); and Wainwright v. Witt, ___U.S.___, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

It is rather obvious from the record that the trial judge was attempting to preclude any problems arising from challenges of jurors for cause by requiring the state to use peremptory challenges to remove jurors who were clearly not qualified to serve on the petit jury. While it is admirable for the trial judge to attempt to avoid reversible error, his efforts here led to the present confused state of affairs.

By the time juror Bounds was voir dired the State had been forced to use all of its peremptory challenges and, therefore, had none left with which to remove juror Bounds. This situation arose from the failure of the trial court to excuse jurors, Mr. Ruiz, Mrs. Coker, Mrs. Bush, Mrs. Price, and Mrs. Walker.[1] Of course, had the trial court properly excused these five jurors the state would have had a peremptory challenge with which to remove Mrs. Bounds and

---

[1] The voir dire of these individuals is attached hereto as part of the appendix. The voir dire is set forth as follows: Mr. Ruiz (Record 367-378); Mrs. Coker (Record 381-383); Mrs. Bush (Record 385-393); Mrs. Price (Record 394-400); Mrs. Walker (Record 401-403).

this petition would not be necessary. Unfortunately, the trial court did not follow this path, and even when the judge attempted to correct his error, he created more confusion. Instead of simply reversing his ruling as to one of the five jurors previously excused by the state on their peremptory challenges, he excused juror Bounds for cause.

Respondents respectfully suggest that there is no doubt that the five jurors which the state was required to exercise peremptory challenges to remove should have been removed for cause. This was recognized by the Mississippi Supreme Court in its opinion wherein the Court stated:

> Although the route taken to Mrs. Bounds' dismissal was a circuitous one indeed, and most highly disfavored, it should be obvious to all that no prejudice occurred to the defendant Gray. The force and effect of the trial court's ruling was to correct an error he had committed in refusing to dismiss other jurors for cause after they had unequivocally stated that they could not vote to impose the death penalty in any circumstance. Certainly the state is entitled to a jury that can follow the instructions and jurors oath. Adams, supra; Witt, supra. That being the case the trial court was correct when it recognized the error in its prior rulings and took affirmative action to correct that error. [472 So. 2d at 422-423, emphasis added]

Of course, errors of a trial judge may be corrected on appeal. Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 1217, 18 L. Ed. 2d 288 (1967). The ruling by the Mississippi Supreme Court simply recognized that the trial court should properly have reversed itself on its earlier rulings as to the five jurors and excused them for cause which would then have allowed the state to reclaim its previously expired peremptory challenges. Thus, the ruling of the Mississippi Supreme Court simply corrected error of

the trial judge. As the Mississippi Supreme Court went on to state:

> There is no logical reason not to allow the trial court in this situation to correct its erroneous ruling prior to the empanelling of the jury in termination of trial. Notions of judicial economy make it clear that the trial court should be allowed to recognize and correct its error early in the proceedings, especially where as here, there could have been no possible prejudice to the defendant. [472 So. 2d at 423].

Respondents would respectfully suggest that the words of the trial judge in rectifying the problem which had occurred are not some "magical incantation" which cannot be cured. What should be examined is the effect of the ruling, and not simply the words which led to it. The defendant is merely entitled to an impartial jury, and it is doubtful whether this issue would have been raised at all had this not been a capital case. Respondents would respectfully suggest that the ruling in this case should not be different simply because it is a capital case than it would be in any other case. As stated by this Court in Wainwright v. Witt, supra:

> . . .there is nothing talismanic about juror exclusion under Witherspoon merely because it involves capital sentencing juries. Witherspoon is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who will quite likely be biased in his favor. [83 L. Ed. 2d at 851].

The State is put in a somewhat unique position in this case as it is the one claiming foul for being forced to exhaust its peremptory challenges on persons who should have been excused for cause. It is beyond peradventure that had the roles been reversed, that the defendant would have had reversible error. The State, however, does not wish to "win the battle and lose the war". If the State simply says that it was required to exhaust its peremptory challenges on persons who should have been excused for cause and the Court then determines that that was, in fact, reversible error, it is placed in the position of asking the Court to order a retrial, which it does not want, after obtaining a conviction and death sentence. Whereas this would be the proper route for the defendant, it would be ludicrous for the State. Therefore, the State's position is simply that by correcting the lower court's error, the Mississippi Supreme Court has "set the record straight" without prejudice to the State or defendant. Respondents would respectfully suggest that this as at least part of the role which it is expected that appellate courts will play.

The exercise of peremptory challenges is clearly a matter of state law. "[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] grant peremptory challenges" Swain v. Alabama, 380 U.S. 202, 219, 13 L. Ed. 2d 759, 772, 85 S. Ct. 824 (1965) quoting Stilson v. United States, 250 U.S. 583, 586, 63 L. Ed. 1154, 1156, 40 S. Ct. 28. It is, of course, a very important part of our jurisprudence and "The denial or impairment of the right is reversible error without a showing of prejudice", Swain, supra, 380 U.S. at 219. Here the State is the one impaired, and the defendant cannot complain since his rights were not denied or impaired. The State is simply asking this Court to

recognize its rights in peremptory challenges as well as those of the defendant. The defendant received a fair trial by an impartial jury, and that is all the Constitution requires.

Since the defendant was not prejudiced, and since the Mississippi Supreme Court has corrected the error of the trial judge, certiorari is simply not warranted in this case. The State as well as the defendant is entitled to a fair and impartial jury, which is what was empanelled for the trial of the defendant. In fact, even here, the Petitioner does not contend that the jury which actually tried, convicted, and sentenced him to death was not fair and impartial. Instead, he relied solely on an error of the trial judge which was corrected by the Mississippi Supreme Court.

CONCLUSION

For the above and foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

BY MR.
NECAISE: Then, I take it, Mr. Ladner, that if you feel that this is a case, after you have heard all of the evidence in this case, Mr. Ladner, if you feel that, based on the evidence that you heard and the law that His Honor gives you, if you feel that this is a case, if you feel that the evidence warrants the imposition of the Death Penalty, and the Court tells you that the Death Penalty is allowed in this type of case, are you telling me that you could vote for the Death Penalty?

BY MR.
LADNER: Yes, sir.

BY MR.
NECAISE: You're telling me that you could do that?

BY MR.
LADNER: Yes, sir.

BY MR.
NECAISE: Mr. Ruiz, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MR.
RUIZ: Yes, I do.

BY MR.
NECAISE: You do. Now, is that in this particular type case, Mr. Ruiz, or in any case?

BY MR.
RUIZ: In any case.

BY MR.
NECAISE: Are you telling me, Mr. Ruiz, that no matter what law, what instruction His Honor would give you all on that, if he told you that this is a case that, uh, where you could bring in the Death Penalty, are you telling me thatpu could not, that you could, nonetheless, not under any circumstances bring in a penalty and impose the Death Penalty, regardless of what the law is?

BY MR.
RUIZ: No, I couldn't.

BY MR.
NECAISE: You could not.

Is that in this case or in any type case?

BY MR. RUIZ: Any type case.

BY MR. NECAISE: Did the Court hear those questions?

BY THE COURT: Yes, sir.

BY MR. NECAISE: All right, sir. Now, if Your Honor please, we move to strike Mr. Ruiz for cause.

BY THE COURT: I'll overrule it, at this point.

BY MR. NECAISE: All right, sir. We intend to, uh, this is the time, if Your Honor please, that we would like to use one of our challenges at this time, uh, to replace him so that we can move on.

BY THE COURT: All right. You can step down, Mr. Ruiz.

BY MR. NECAISE: And let the record show that the State takes exception to the Court's ruling on that because we think.....

BY THE COURT: (Interposing) All right.

BY MR. NECAISE: .....it's a classic case of one for cause.

BY THE COURT: All right. Uh, Mrs. Berthelot. Right up there, Mrs. Berthelot. You take his place.

And Mr. Ruiz may go and call back tomorrow afternoon, after five.

Go ahead, Mr. Necaise.

BY MR. NECAISE: Mrs. Berthelot, I'll just go on and ask you, while you're here, so I can move right on down.

Mrs. Berthelot, you heard the questions as to what type of case this was and so forth and what your

ing to ask it. But, I feel that this is the type of case that warrants my knowing, without any doubt in my mind as to what your feelings about it are. And I make that explanation to you about it.

Mrs. Coker. Mrs. Coker, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS.
COKER: I do not believe in it.

BY MR.
NECAISE: You do not believe in Capital Punishment.

Now, Mrs. Coker, do you tell me you don't believe in Capital Punishment in this type of case or in any type of case?

BY MRS.
COKER: In any type of case.

BY MR.
NECAISE: You mean to tell me that if the Court instructed you that this is a case, gave you the law and told

you that this is a case whereby you could impose the Death Penalty, that you would not follow the law, if it meant imposing the Death Penalty?

BY MRS.
COKER: (Inaudible.)

BY MR.
NECAISE: Ma'am?

BY MRS.
COKER: I would not.

BY MR.
NECAISE: You would not do it?

BY MRS.
COKER: I would not do it.

BY MR.
NECAISE: You just don't believe in Capital Punishment.

BY MRS.
COKER: That's right.

BY MR.
NECAISE: And you would never vote for Capital Punishment, are you telling

me, in any case or just this type case?

BY MRS. COKER: In any case. I would never vote for it in any case.

BY MR. NECAISE: You would never vote for the Death Penalty.

Now, if Your Honor please, we would move at this time for the Court to excuse Mrs. Coker for the same reason.

BY THE COURT: I'll require you to use one of your challenges.

BY MR. NECAISE: All right, sir.

BY THE COURT: You call back tomorrow afternoon, after five o'clock.

Mrs. Bush, you take her place. Annie Mae Bush. You take her place, the one that just left.

BY MR. NECAISE: You want to question her, first?

BY THE COURT: You can ask her the questions.

BY MR. NECAISE: Sir?

BY THE COURT: You can just ask her the questions.

BY MR. NECAISE: Which ones did you want me to ask her?

BY THE COURT: Well, let's see, there's two ladies up there, too, Mrs. Berthelot and Mrs. Ware.

BY MR. NECAISE: Mrs. Berthelot and Mrs. Ware. Any of the three of you, Mrs. Berthelot, Mrs. Ware and Mrs. Bush, any of you know any of the parties that the Court inquired about?

Any of the lawyers ever represented you or any member of your family?

Any of your husbands, uncles, brothers, cousins or anybody members of any law enforcement agencies?

Anybody know any of the witnesses that the Court called?

Any of you three know anything about the case, read anything in the newspapers about the case, when it happened?

BY MRS.
WARE: I've heard about it.

BY MR.
NECAISE: Whatever you've heard about it, Mrs. Ware, could you put that out of your mind and try this case on the law and the evidence and nothing else?

BY MRS.
WARE: Yes, sir.

BY MR.
NECAISE: Now, Mrs. Bush, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS.
BUSH: I don't know, I don't know if I do or not.

BY MR.
NECAISE: Now, if the Court, you're going to first be called upon to decide the guilt or innocence.

BY MRS.
BUSH: Yes, sir.

BY MR.
NECAISE: And after that, if you find him guilty, then the Court is, you are going to hear some additional evidence. And then you are going to go back and decide whether he suffers the Death Penalty or whether he gets a life sentence.

Now, are you telling me that you have any conscientious scruples, do you believe in Capital Punishment?

BY MRS.
BUSH: (Inaudible.)

BY MR.
NECAISE: Ma'am?

BY MRS.
BUSH: Yes, if he's guilty.....(inaudible.)

BY MR.
NECAISE: Ma'am?

BY MRS.
BUSH: Yes, if he's guilty.

BY MR.
NECAISE: But, you, are you saying that you don't know?

BY MRS.
BUSH: No, I don't.

BY MR.
NECAISE: You don't know whether one deserves it or not. Well, of course, you wouldn't know that until you heard the evidence.

BY MRS.
BUSH: I mean, you know, I would, I would vote not guilty.

BY MR.
NECAISE: You would vote not guilty, if you was on the Jury?

BY MRS.
BUSH: That's right.

BY MR.
NECAISE: You mean you would vote not guilty as to what one of them, uh, about whether he committed the crime or not guilty as to whether he ought to get the Death Penalty?

BY MRS.
BUSH: Not guilty as to whether he should get the Death Penalty. I don't think anybody should get the Death Penalty.

BY MR.
NECAISE: You don't think anybody, ma'am?

BY MRS.
BUSH: (Inaudible.)

BY MR.
NECAISE: You don't think anybody ought to ever get the Death Penalty?

BY MRS.
BUSH: I mean, the way the Jury is going now, what I'm saying is, I would, I would vote not guilty.

BY MR.
NECAISE: Right now, the way this Jury's going, you would put not guilty?

BY MRS.
BUSH: Yes, sir.

BY MR.
NECAISE: Is that not guilty, you would.....

BY MRS.
BUSH: (Interposing) I would, you know, I would vote not guilty on the Death Penalty.

BY MR.
NECAISE: You would, in other words, you don't believe in the Death Penalty?

BY MRS.
BUSH: No, sir, I don't.

BY MR.
NECAISE: Is that in just this kind of case or any kind of case?

BY MRS.
BUSH: Any kind of case.

BY MR.
NECAISE: You just don't believe anybody ought to get the Death Penalty?

BY MRS.
BUSH: Yes, sir.

BY MR.
NECAISE: You just don't believe that anybody ought to get the Death Penalty. Regardless of what the evidence is?

BY MRS.
BUSH: I'm saying that I don't think anybody should get the Death Penalty.

BY MR.
NECAISE: Regardless of what the evidence are, you don't believe anybody ought to be put to death for any type of crime that they've committed?

BY MRS.
BUSH: Well, look here, I mean, I don't know whether he's guilty or not guilty. I can't say whether he's guilty or not guilty.

BY MR.
NECAISE: I understand that. And we going to have to prove.....

BY MRS.
BUSH: (Interposing) That's why, that's why I say I can't say that he should have the Death Penalty. I can't say that.

BY MR.
NEOCAISE: Let me ask you this, you are first going to be called upon to decide his guilt or innocence.

BY MRS.
BUSH: (Inaudible.)

BY MR.
NEOCAISE: And let's say that all twelve of you agree that he did it. Okay.

Now, he's been convicted. All twelve of you have agreed that he's the one what killed him, killed Ronald Wojcik.

And then you'll come out here and you'll hear some more evidence and you'll go back to that same room a second time and you'll decide whether he ought to get life or death.

Now, at that time, could you vote for the Death Penalty?

BY MRS.
BUSH: (Inaudible.)

BY MR.
NEOCAISE: Ma'am?

BY MRS.
BUSH: I don't think so.

BY MR.
NEOCAISE: Well, is it, is it just this type of case, Mrs. Bush, or is it any case?

BY MRS.
BUSH: It would be in any case.

BY MR.
NEOCAISE: Well, are you telling me that no matter what type of crime occurred, no matter what type of crime occurred out here in the streets in the City of Gulfport, that if Mrs. Bush was brought up here to decide, along with eleven other folks, that that individual that committed that crime ought to get the Death Penalty, could you vote for the Death Penalty?

BY MRS.
BUSH: No, sir.

BY MR.
NEOCAISE: You could not, are you telling me now that you never would vote for the Death Penalty?

BY MR.
BUSH: Yes, sir.

BY MR.
NECAISE: Now, with her answer being in the negative, if the Court please, we call upon the Court again and ask the Court to excuse her because of her conscientious scruples against Capital Punishment.....

BY THE
COURT: (Interposing) I'll overrule you on that. Let her step down.

BY MR.
STEGALL: Judge, are you going to excuse her for cause on that?

BY THE
COURT: No. You step down.

And, Mrs. Price, you take her place.

(Off-the-record discussion between Mr. Necaise and Mr. Stegall.)

BY THE
COURT: He used his challenge on her, peremptorily.

BY MR.
NECAISE: Do you want to question her first, Judge?

BY THE
COURT: No, you can go ahead with Mrs. Price now.

BY MR.
NECAISE: Mrs. Price, Mary Price, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS.
PRICE: I don't believe in Capital Punishment.

BY MR.
NECAISE: Are you telling us that where the evidence, where the law allows and the evidence warrants, that you could not, in fact, vote for the Death Penalty?

BY MRS.
PRICE: I just don't think that the Death Penalty should be imposed.

BY MR.
NECAISE: Are you telling me, Mrs. Price,

that you couldn't vote for the Death Penalty in this type of case or any type of case?

BY MRS. PRICE: In any type of case.

BY MR. NEGAIS: Okay. Now, let me say this to you. I don't, uh, don't be embarrassed. You are perfectly entitled to that feeling, uh, and if that's your view, you are certainly entitled to it. I am certainly not trying to embarrass you.

But, what I am looking for is twelve people who come into the Jury Box who say that if the evidence warrants and the law allows, that they could, in fact, impose the Death Penalty if they find those two, if the law allows and the evidence warrants.

And, uh, but, you are, are you telling me that you couldn't, you could not, in this, not in any type, not in any type of case, regardless of what type of crime happened in the streets of the City of Gulfport,

that you could not, you could never vote, when they brought the individual in, who had been adjudged guilty, you could never vote to give he or she the extreme penalty of death, regardless of what the evidence showed?

BY MRS. PRICE: Well, it would depend upon the type of case and depending upon the facts.

BY MR. NEGAIS: What type of case would it take? Give me a set of facts where you would vote to impose the Death Penalty.

BY MR. STEGALL: If it please the Court, I object to that.

BY THE COURT: Overruled.

BY MR. NEGAIS: Give me a set of facts, Mrs. Price, where, if you were seated on the Jury, and the person had been adjudged guilty, and you had heard

all the evidence and he had been adjudged guilty. And now it becomes time for you to decide the penalty phase. What type of evidence, what type of case would it have to be for you to vote for the Death Penalty?

BY MRS. PRICE: (No response.)

BY MR. NEGAIRE: Ma'am?

BY MRS. PRICE: You've confused me.

BY MR. NEGAIRE: Well, I don't, I'm sorry, I don't mean to confuse you and I apologize. I hope I'm not doing it. Am I?

BY MRS. PRICE: No. I'm just nervous.

BY MR. NEGAIRE: I know your nervous. Okay. Just settle down and just be calm. Did you understand my question?

BY MRS. PRICE: You wanted to know what type of case, what facts it would take for me to be able to vote for the Death Penalty.

BY MR. NEGAIRE: Right. And that is a case where the law warrants it and the evidence allows it. You see, the law, it's not my law and it's not the Judge's law, we have to follow the law that the Legislature passes up there in Jackson and that the United States Supreme Court says is the law, we have to take those laws and work with them. And, as you heard the Judge explain, not every person who kills someone can get the Death Penalty.

But, if you kill someone while doing certain things, then you are subject to the Death Penalty, if the Jury so desires to impose the Death Penalty.

And, what I'm trying to find out is that if this is a case that you find that the evidence allows and the law warrants, in this case,

the imposition of the Death Penalty, could you vote to give this Defendant, right here, the Death Penalty?

BY MRS. PRICE: I don't think I could.

BY MR. NEGAISE: You don't think you could. Is that on this case or on any case?

BY MRS. PRICE: I don't think I could take it upon myself to vote for the Death Penalty for anybody.

BY MR. NEGAISE: On any case?

BY MRS. PRICE: Yes, sir.

BY MR. NEGAISE: Ma'am?

BY MRS. PRICE: Yes, sir, on any case.

BY MR. NEGAISE: You could never vote for it.

Now, if Your Honor please, we would

excuse, ask that the Court, ask the Court to excuse her for the same cause, we call upon the Court to excuse her.

BY THE COURT: I'll overrule you.

BY MR. NEGAISE: Judge, how many has the State used?

BY THE COURT: Five.

You can step down. Call back tomorrow afternoon, after five.

Mr. Herring, take her place.

BY MR. NEGAISE: Mr. Herring, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MR. HERRING: No, sir.

BY MR. NEGAISE: Then, I take it that if you found that this was a case where the law allows and the evidence warrants

the imposition of the Death Penalty, you could, in fact, vote for the Death Penalty?

BY MR. HERRING: Yes, sir.

BY MR. NECAISE: Now, let's see, you're going to have to help me. This is Mrs. Walker. Mrs. Walker, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. WALKER: (Inaudible.)

BY MR. NECAISE: Ma'am?

BY MRS. WALKER: I don't have any objection to it. But, I couldn't vote for it.

BY MR. NECAISE: You don't have any objections to it, but you just couldn't vote for it.?

BY MRS. WALKER: No.

BY MR. NECAISE: It would be all right for somebody else to vote for it. But, you couldn't vote for it. Is that what you're telling me, Mrs. Walker?

BY MRS. WALKER: Yes, sir.

BY MR. NECAISE: You believe in it, but you couldn't vote for it?

BY MRS. WALKER: Yes, sir.

BY MR. NECAISE: Is that in this type, in this particular type case, Mrs. Walker, or in any type case?

BY MRS. WALKER: In any type case.

BY MR. NECAISE: Are you telling me that no matter what the evidence in this case would show, you could never vote

for the Death Penalty in any kind of case?

BY MRS. WALKER: No, I couldn't.

BY MR. NECAISE: If the Court please, we call upon the Court again.

BY THE COURT: I'll overrule you again and let you use your peremptory.

BY MR. NECAISE: Judge, let me ask that the record state that in all of these I am taking exception to the Court's ruling.

BY THE COURT: All right.

You may step down, Mrs. Walker.

And Mrs., uh, Saucier, is it Mr. or Mrs. Saucier?

BY MRS. SAUCIER: Mrs.

excuse Mrs. Clemons.

BY THE COURT: All right, Mrs. Clemons. You call back tomorrow, after five.

Mrs. Bounds, you take her place. Mrs. H. C. Bounds.

Mrs. Bounds, do you know anyone involved in this lawsuit?

BY MRS. BOUNDS: No, sir.

BY THE COURT: Know of no reason why you couldn't be a fair and impartial Juror?

BY MRS. BOUNDS: No, sir.

BY THE COURT: You think you meet all the tests to be a fair and impartial Juror?

BY MRS. BOUNDS: I'll try.

BY THE COURT: I am sure you will.

What do you say as to Mrs. Bounds, Mr. Necaise?

BY MR. NECAISE: Mrs. Bounds, have you read anything in the newspaper or saw anything on the television about this case?

BY MRS. BOUNDS: Yes, sir.

BY MR. NECAISE: Whatever that was, could you put that out of your mind and try this case strictly on the law and the evidence that comes from this w.t-ness stand?

BY MRS. BOUNDS: Yes, sir.

BY MR. NECAISE: All right. And do you have any con-scientious scruples against Capital Punishment when imposed by the law?

BY MRS. BOUNDS: I don't know.

BY MR. NECAISE: Well, I don't know either.

BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Well, I mean, I don't know how you feel about it. I know how I feel about it. I believe in it. You know, if you asked me, I could vote to impose the Death Penalty. But, I'm not going to be allowed to vote on it.

And, what I am trying to do is to find twelve people who tells me that they have no conscientious scruples against Capital Punishment when imposed by the law.

Do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Are you telling me, Mrs. Bounds, that you could, if the evidence allows, if the evidence warrants and the law allows the imposition of the Death Penalty, that you

could, in fact, vote for the Death Penalty?

BY MRS. BOUNDS: Would you ask me that again?

BY MR. NECAISE: All right. If the evidence warrants it and the law allows it, I can tell you at the front end that the law, in this type of case, allows the imposition of the Death Penalty.

The evidence will be a decision for you to make as to whether this type of evidence warrants the imposition of the Death Penalty.

BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Could I ask the Court to question Mrs. Bounds further?

BY THE COURT: Well, Mrs., uh, Bounds, the question is this, uh, I'll read it to you.

"Would you automatically vote

against the imposition of the Death Penalty without regard to any evidence that might be developed in the trial of this case?"

BY MRS. BOUNDS: I would try to listen to the case.

BY THE COURT: That's not answering my question. Uh, the question. The question will be, should be answered yes or no. Now, I'll read it again.

"Would you automatically vote against the imposition of the Death Penalty without regard to any evidence that might be developed in the trial of this case?"

BY MRS. BOUNDS: Read it again.

BY THE COURT: Huh?

BY MRS. BOUNDS: Would you read that over again?

BY THE COURT: All right, I'll read it again.

Uh, now listen carefully to what I'm asking you.

"Would you automatically vote against the imposition of the Death Penalty regardless of the evidence that might be developed in the trial of this case?"

BY MRS. BOUNDS: No, sir.

BY THE COURT: You would not?

BY MRS. BOUNDS: No, sir.

BY THE COURT: All right. I take it then that you have no conscientious scruples against the imposition of it, when it's authorized by law, if you would not automatically vote against it?

BY MRS. BOUNDS: (No audible response.)

BY THE COURT: Nobody goes around.....

BY MR. NECAISE: (Interposing) Judge, she was about to answer the Court on something. I don't know what it was.

BY THE COURT: What is it, Mrs. Bounds?

BY MRS. BOUNDS: I would do my best.

BY THE COURT: Well, that's not the question.....

BY MRS. BOUNDS: (Interposing, but inaudible as the Court continued talking, as Mrs. Bounds was talking.)

BY THE COURT: .....as to whether you would do your best or not. Nobody's doubting your sincerity, Mrs. Bounds. And, uh, the law does not allow the Courts to go around, just willy-nilly, killing people because of crimes. Do you understand?

BY MRS. BOUNDS: (Inaudible.)

BY THE
COURT: It's certain types of crimes where it may be imposed and the question is simply this:

"Would you automatically vote against the imposition of the Death Penalty regardless of any evidence that might be developed in the trial of this case?"

BY MRS.
BOUNDS: No, sir, I don't think I would.

BY THE
COURT: She said she wouldn't.

BY MR.
NECAISE: No, sir. She said I don't think I would.

BY THE
COURT: Answer me yes or no, Mrs. Bounds. If you're against it, say so. And if you're not, say you're not. You can say one or the other.

BY MRS.
BOUNDS: No, sir.

BY THE
COURT: No?

BY MRS.
BOUNDS: No, sir.

BY THE
COURT: In other words, you do not have any conscientious scruples against the imposition of the Death Penalty, if it's authorized by law. Is that right?

BY MRS.
BOUNDS: No.

BY THE
COURT: No. Okay.

BY MR.
NECAISE: Mrs. Bounds, if this is a case where you find, from the evidence that it warrants the imposition of the Death Penalty, could you go back there and vote for the Death Penalty in this case?

BY MR.
STEGALL: Judge, I'm going to object to him continuing, she, the Court has explained to her fully.....

BY THE
COURT: (Interposing) Overruled, one time.

I'm not going to let him go much further though.

BY MR.
STEGALL: Excuse me, Mr. Necaise.

BY MR.
NECAISE: In this case, if the evidence warrants and the law allows, and you get back there.....(inaudible).. and you all are back there, trying to decide whether this Defendant should suffer the penalty of death, and you find from the evidence that you've got laid there before you that, in your opinion, from what you've heard and what you've seen from the evidence, that this is a case that warrants this man dying in the gas chamber, could you vote that he should suffer the penalty of death?

BY MRS.
BOUNDS: I have to say yes or no?

BY MR.
NECAISE: Yes, ma'am.

BY MRS.
BOUNDS: How can I say that when I've never

experienced it?

BY MR.
NECAISE: Well, what I am saying is could you listen to the evidence and if you find that this is a case, if the case warrants it - that's a decision you're going to have to make. If this is a case that you find, in your mind, okay, if this is a case, this is in your mind, if you think, if you come up with this conclusion, okay, this is a case that this person should suffer the Death Penalty, such horrible, atrocious, heinous crime, in my opinion, in Mrs. H. C. Bounds' opinion, this man should suffer the penalty of death, could you write down "Death Penalty"?

BY MRS.
BOUNDS: I don't think I could.

BY MR.
NECAISE: You don't think you could?

BY MRS.
BOUNDS: I don't think I could.

BY MR.
NECAISE: You could not!

Now, if Your Honor please, we.....

BY THE
COURT: (Interposing) Well, I don't know whether she could or couldn't. She told me she could, a while ago.

BY MR.
NECAISE: Well, all I can do, Judge, is go by what, by what the lady says.

The Court's put, the Court has put the State in a precarious position by making us use our challenges when we clearly met the law in about six cases. On about six challenges that the Court has made us use.....

BY THE
COURT: (Interposing) Well, I think I had one or two that.....

BY MR.
NECAISE: (Interposing) I agree with you, Judge. There's two of them.....

BY THE
COURT: .....just used that to get off of the Jury. At least one person that I'm positive of.

BY MR.
NECAISE: Well, I'm sorry that they did that, Judge.

BY THE
COURT: All right. All right.

Let me ask you the question again. Now, answer me yes or no and search your conscience on it because you, you, I know you're an honest and sincere person.

BY MRS.
BOUNDS: I think I am.

BY THE
COURT: And anybody that,uh, born and raised up in Scott County and goes to the Presbyterian Church is, uh, has got to be a good clean individual.

All I want you to do is just search your own conscience and tell me, positively, give me a yes or no, to this and don't equivocate. The question, once again, is:

"Would you automatically vote against the imposition of the Death

Penalty regardless of any evidence that might be developed in the trial of this case?"

Now, take your time and think about it and answer it yes or no, Mrs. Bounds.

BY MRS. BOUNDS: No, sir.

BY THE COURT: You are positive it's no?

BY MRS. BOUNDS: Yes.

BY THE COURT: Well, do you understand that, uh, you're telling me now that you can impose the Death Penalty?

BY MRS. BOUNDS: (No audible response.)

BY THE COURT: Do you understand that's what you are telling me?

BY MR. NECAISE: Judge, the lady does not understand

your question.

BY THE COURT: Wait a minute, Mr. Necaise.

BY MR. STEGALL: Judge, I'm going to object to the District Attorney.....

BY THE COURT: (Interposing) I've already, I've already set him down. I don't need any help from either one of you. All right.

Do you realize that you've said, I'm afraid that a while ago you didn't understand my question, Mrs. Bounds.

Do you realize that you have now told me that you could impose the Death Penalty?

BY MRS. BOUNDS: That I can impose the Death Penalty?

BY THE COURT: Yes, ma'am. That is what you just told me, if you understood the question.

BY MRS.
BOUNDS: Okay.

BY THE
COURT: Now, can you or not?

BY MRS.
BOUNDS: I thought you said can I vote against it.

BY THE
COURT: No. Let me read it one more time. It's the same question now, Mrs. Bounds.

"Would you automatically, would you automatically vote against the imposition of the Death Penalty regardless of any evidence that might be developed in the course of the trial?"

BY MRS.
BOUNDS: (No response.)

BY THE
COURT: The question is in the first few words - "Would you vote against". Is your answer to that yes or no?

BY MRS.
BOUNDS: No.

BY THE
COURT: You would not vote against it?

BY MRS.
BOUNDS: (No response.)

BY THE
COURT: You could vote for the Death Penalty?

BY MRS.
BOUNDS: I think I could.

BY THE
COURT: All right. She says she can vote for the Death Penalty.

BY MR.
NECAISE: Judge, I want to make a Motion now.

BY THE
COURT: All right. Come to the Bench and make your Motion.

(At the Bench, with the Court, Counsel and Court Reporter present, and outside the hearing of the Jurors in the Box and of the Courtroom, the following proceedings were then had:

(BY MR.
NECAISE: The State had exhausted their

peremptory challenges, their twelve peremptory challenges. And, of course, the State would not, the Court would not allow the State to excuse anybody who had conscientious scruples against Capital Punishment under any circumstances and would vote against the Death Penalty under any circumstances on five differsnt Jurors, which we can give the Court their names, and the Court MADE us use our challenges.

And now we get on one where the Court has, where she has equivocated and where she has said one time yes and one time no. And there's just no question about it that if we had another challenge, we would use it on this lady because as the Court can see she is very weak and indecisive about the question.

And I ask the Court, because the Court has not followed this case, throughout the case, that you let us have anothsr challenge in this case, in particular, on this woman and we can give you the ones on Ruiz, uh, Coker, uh, Arlean Walker, Annie Mae Bush, uh, Lassabe, Price

and, uh, who were very unequivocal, that they would not, under any circumstances, would not vote to impose the Death Penalty.

(BY THE COURT: Well, I think that's right, I made you use about five of them that didn't equivocate. Uh, I never had no idea that we'd run into this many.

(BY MR. NECAISE: I didn't either, Judge.

(Discussion between Court and Counsel.

(BY MR. STEGALL: We're going to object to the granting of a thirteenth peremptory challenge. The Court has already ruled on the State's, uh, uh, arguments in previous attempts at challenges for cause and the granting of a thirteenth would, uh, be one in excess of that provided by law. And the Defendant would object, if, uh, ...

(BY MR. NECAISE: Judge, I'm not asking you to give

us a thirteenth challenge. I'm asking the Court to change its ruling and use those, uh, for cause rather than having the Court, uh, rather than having the State to use its peremptories.

I'm asking the Court to, to change its ruling.....

(BY THE COURT: (Interposing) Well, I didn't examine them myself. Of course, I admit that they were unequivocal, about five of them, that answered you that way.

Go ask her if she'd vote guilty or not guilty, if she could vote guilty or not guilty and let's see what she says to that.

If she says, if she gets to equivocating on that, I'm going to let her off as a person who can't make up her mind.

(BY MR. STEGALL: Well, Judge, my, un, we will respond, of course, subject to what happens here.....

(BY THE COURT: (Interposing) All right. All right. Let's go.)

BY MR. NEGAISE: Mrs. Bounds, do you feel like this is a case, and I don't, I certainly don't want you to think that I'm picking on you. But, uh, what we are trying to do here is that we are trying to pick twelve people, uh, who we feel that, uh, would be fair and impartial persons, what we are looking for is people who could be fair and impartial and who could, if the evidence warranted it, could impose the Death Penalty because we feel that this is a case that warrants the imposition of the Death Penalty. We know that the law allows it.

And could you tell me, do you feel like you could reach a verdict in this case, either guilty or not guilty in this case?

BY MRS. BOUNDS: Could I reach a verdict?

BY MR.
NECAISE: A verdict.

BY MRS.
BOUNDS: A verdict?

BY MR.
NECAISE: Yes, ma'am.

BY MRS.
BOUNDS: Either way?

BY MR.
NECAISE: Yes, ma'am.

BY MRS.
BOUNDS: Yes.

BY MR.
NECAISE: You could reach a verdict of guilty or not guilty. Now, if that verdict was guilty and you felt that from the evidence that you used to find him guilty, that evidence which you had used to find him guilty, if you felt that that evidence was of such a heinous, atrocious and cruel manner, do you feel that you could vote for imposing the Death Penalty on this twenty-eight year old Defendant?

BY MRS.
BOUNDS: Yes.

BY MR.
NECAISE: Ma'am?

BY MRS.
BOUNDS: Yes.

BY MR.
NECAISE: Judge, the lady says yes, but we would challenge her for cause.

BY MR.
STEGALL: If it please the Court, I would like to point out that she has answered the question in the proper manner .....

BY THE
COURT: (Interposing) You all approach the Bench. You all approach the Bench.

(At the Bench, with the Court, Counsel and the Court Reporter present, outside the hearing of the Jurors in the Box and of the Courtroom, the following proceedings were then had:

(BY MR.
STEGALL: She answered his question and, and,

she's answered his questions in exactly the proper manner. She, obviously, would have some difficulty, as me or anybody else would, on a Death Penalty, but she said she could do it, if the facts justified it.

Now, Mr. Necaise never used the language of the case that you've been using in directing your questions to them, when he asked these people those questions.

(BY THE COURT: I don't believe he did, either, when you come right down to it. I don't believe you did, Albert.

(BY MR. NECAISE: I didn't use it, but I said could you, in any case, and they said we could not, in any case, we could not and I said, do you mean to tell me that if the law says that you could find this person guilty and sentence him to Life, you tell me that you wouldn't follow the law. No, we would not follow the law, if it meant giving him the Death Penalty. We would not, under any

circumstances. Remember, I even asked one woman, well, what kind of case would you vote for the Death Penalty and she said I don't know of any case that I'd vote for the Death Penalty. And I said give me an example, pick out the case.....

(BY THE COURT: (Interposing) I should have questioned them on this, I guess.....

(BY MR. NECAISE: (Unable to distinguish Mr. Necaise's remarks as the Court continued talking, at the same time.)

(BY THE COURT: .....but I never had no idea it was going to.....

(BY MR. STEGALL: (Interposing) Disregarding the evidence.....

(BY THE COURT: .....wind up in a mess like this. I'd hate to get a conviction and get it reversed because of this one woman. She can't make up her mind.

Well, let the record show that the Court is of the firm opinion that there was at least five, even though I think there's around nine challenges been used by the District Attorney for cause, either eight or nine, all right, there was eight of them that had said that they were against Capital Punishment.

And I think there was, uh, five of those that were unequivocally opposed to it and answered, in substance, if not even stronger language than the question set forth in the Witherspoon case, uh, from the United States Supreme Court, uh, that I should, at this point, allow him to challenge this lady for cause. She is totally indecisive. I think she is totally indecisive. She says one thing one time and one thing another.

The Court is of the opinion that it cheated the State by making him, uh, use, uh, by making the District Attorney use his peremptory challenges in at least five instances. And I'm going to allow it in this particular case.

(BY MR. STEGALL: Excuse her for cause?

(BY THE COURT: I'm going to excuse her.

(BY MR. STEGALL: Let me ask the Court this, is the Court of the opinion that, uh, that there has been a sufficient record .....

(BY THE COURT: (Interposing) I'm not going to add any to his challenges.

(BY MR. STEGALL: Okay. All right.

(BY THE COURT: I'm not going to go back and give him five more. I'm going to excuse her for cause.

(BY MR. STEGALL: Okay. All right.)

BY THE COURT: You can go, Mrs. Bounds, and call back tomorrow afternoon.

CERTIFICATE OF SERVICE

This is to certify that I, Donald G. Barlow, a Special Assistant Attorney General for the State of Mississippi, have caused to be mailed this date, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing **Respondent's Brief in Opposition** to the following:

Honorable Andru H. Volinsky
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This, the 20th day of December, 1985.

Donald G. Barlow
DONALD G. BARLOW

Supreme Court, U.S.
FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 85-5454

In the Supreme Court of the United States

OCTOBER TERM, 1985

DAVID RANDOLPH GRAY, PETITIONER

v.

STATE OF MISSISSIPPI, RESPONDENT

ON WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: SEPTEMBER 25, 1985
CERTIORARI GRANTED: FEBRUARY 24, 1986

62 pp

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CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
6/18/82	Indictment returned,
	Defendant arraigned,
	Counsel appointed.
7/16/82	ORDER—Def. withdraws Motion for Transcript,
	ORDER—Clerk to issue special venire of 200 jurors,
	ORDER—Sustaining Motion to Produce Exculpatory Material,
	ORDER—Overruling Defendant's Motion to Argue Last,
	ORDER—Sustaining Motion that State Select Offense,
	ORDER—Sustaining Motion for Production and Inspection,
	ORDER—Sustaining Motion to Reveal Agreements,
	ORDER—Overruling Motion to Preclude Testimony,
	ORDER—Compelling Defendant to Submit to Blood Test,
	ORDER—Sustaining Motion for Mental Examination.
7/23/82	ORDER—Motion to Suppress Hearing continued to 7/28/82.
7/28/82	ORDER—Motion to Suppress overruled,
	ORDER—Motion to Quash overruled.
8/9/82	Jury selected and sworn,
	Commencement of trial.

Date	PROCEEDINGS
8/12/82	Judgment of conviction entered,
	Defendant sentenced.
8/17/82	ORDER—Overruling Motion for New Trial.
8/20/82	ORDER—Defendant allowed to appeal in forma pauperis,
	Notice of Appeal filed.
	SUPREME COURT OF MISSISSIPPI
6/5/85	Opinion
7/24/85	Rehearing denied.

CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI,
FIRST JUDICIAL DISTRICT

* * * *

(EXCERPTS FROM VOIR DIRE, AUGUST 1982)

[367] BY MR. NECAISE: [The Prosecutor] Mr. Ruiz, do you have any conscientious scruples against Capital Punishment when imposed by law? [368]

BY MR. RUIZ: [The venireman] Yes, I do.

BY MR. NECAISE: You do. Now, is that in this particular type case, Mr. Ruiz, or in any case?

BY MR. RUIZ: In any case.

BY MR. NECAISE: Are you telling me, Mr. Ruiz, that no matter what law, what instruction His Honor would give you all on that, if he told you that this is a case that, uh, where you could bring in the Death Penalty, are you telling me that you could not, that you could, nonetheless, not under any circumstances (sic) bring in a penalty and impose the Death Penalty, regardless of what the law is?

BY MR. RUIZ: No, I couldn't.

BY MR. NECAISE: You could not. [369] Is that in this case or in any other type case?

BY MR. RUIZ: Any type case.

BY MR. NECAISE: Did the court hear those questions?

BY THE COURT: Yes, Sir.

BY MR. NECAISE: All right, sir. Now, if your Honor please, we move to strike Mr. Ruiz for cause.

BY THE COURT: I'll overrule it, at this point.

BY MR. NECAISE: All right, sir. We intend to, uh, this is the time, if your Honor please, that we would like to use one of our challenges at this time, uh, to replace him so that we can move on.

BY THE COURT: All right. You can step down Mr. Ruiz. [370]

BY MR. NECAISE: And let the record show that the State takes exception to the court's ruling on that because we think. . . .

BY THE COURT: (Interposing) All right.

BY MR. NECAISE: . . . it's a classic case of one for cause.

* * * *

[372] BY MR. NECAISE: Do you have any conscientious scruples against Capital Punishment when imposed by law?

BY MR. EASTON: No, Sir.

BY MR. NECAISE: Then, I take it, Mr. Easton, that if this is a case wherein the law allows and the evidence warrants the imposition of the Death Penalty and you feel that this is a case, after you hear it all, that warrants the imposition of the Death Penalty, Mr. Easton, you are telling me you could vote for the Death [373] Penalty?

BY MR. EASTON: I believe so. Yes, sir.

BY MR. NECAISE: You believe so?

BY MR. EASTON: Yes, sir.

BY MR. NECAISE: Do you have doubts, not as to what the evidence is going to show because I'm not asking you to give me a commitment as to what my proof is going to be because I, I understand, Mr. Easton, you are going to have to wait and see what the case warrants, see if it warrants it. But, I want to know if you find that the evidence warrants and the law allows, in this case, could you return a verdict that says that this man sitting here should suffer the extreme penalty?

BY MR. EASTON: I don't think so.

BY MR. NECAISE: You don't think so. All right. Mr. Easton, are you telling me that [374] you could not do that in this case or in any case?

BY MR. EASTON: That would probably depend on the circumstances of the case.

BY MR. NECAISE: In other words, in some cases you might be able to do it?

BY MR. EASTON: Yes, sir.

BY MR. NECAISE: But, in this case, you don't think that you could?

BY MR. EASTON: Yes, sir.

BY MR. NECAISE: Do you have some reason, do you know something about the case that would, you just don't think its the type of case that warrants the Death Penalty? Is that what you're saying?

BY MR. EASTON: Well, I'd have to hear the evidence [375] first before I could make a determination as to whether it warrants the Death Penalty or not.

BY MR. NECAISE: But, then, didn't you just tell me that you didn't think you could return the Death Penalty in this type of case?

BY MR. EASTON: Yes, sir.

BY MR. NECAISE: You could not return it?

MR. EASTON: Yes, sir.

BY MR. NECAISE: Yes, sir, you could not return it or yes, sir, you could return it? Maybe we're having a little trouble communicating here.

BY MR. EASTON: Yes, sir, I don't know whether I could, uh, return the Death Penalty.

[376] BY MR. NECAISE: You have some doubt in your mind?

BY MR. EASTON: Yes, sir.

BY MR. NECAISE: Judge, we ask that you allow us to excuse Mr. Easton, using one of our causes, at this time, in order to expedit things.

THE COURT: Overruled.

BY MR. NECAISE: Well, then, we use one of our challenges.

* * * *

[381] BY MR. NECAISE: Mrs. Coker. Mrs. Coker, do you have any conscientious scruples against Capital Punishment when imposed by law?

BY MRS. COKER: I do not believe in it.

BY MR. NECAISE: You do not believe in Capital Punishment? Now, Mrs. Coker, do you tell me you don't

believe in Capital Punishment in this type of case or in any type of case?

BY MRS. COKER: In any type of case.

BY MR. NECAISE: You mean to tell me that if the court instructed you that this is a case, gave you the law and told [382] you that this is a case whereby you could impose the Death Penalty, that you would not follow the law, if it meant imposing the Death Penalty?

[Inaudible reference deleted]

BY MRS. COKER: I would not.

BY MR. NECAISE: You would not do it?

BY MRS. COKER: I would not do it.

BY MR. NECAISE: You just don't believe in Capital Punishment.

BY MRS. COKER: That's right.

BY MR. NECAISE: And you would never vote for Capital Punishment, are you telling [383] me, in any case or just this type case?

BY MRS. COKER: In any case. I would never vote for it in any case.

BY MR. NECAISE: You would never vote for the Death Penalty. Now, if Your Honor please, we would move at this time for the court to excuse Mrs. Coker for the same reason.

BY THE COURT: I'll require you to use one of your challenges.

BY MR. NECAISE: All right, sir.

* * * *

[385] BY MR. NECAISE: Now, Mrs. Bush, do you have any conscientious scruples against Capital Punishment when imposed by the law?

[386] BY MRS. BUSH: I don't know, I don't know if I do or not.

BY MR. NECAISE: Now, if the court, you're going to first be called upon to decide the guilt or innocence.

BY MRS. BUSH: Yes, sir.

BY MR. NECAISE: And after that, if you find him guilty, then the court is, you are going to hear some additional evidence. And then you are going to go back and decide whether he suffers the Death Penalty or whether he gets a life sentence. Now, are you telling me that you have any conscientious scruples, do you believe in Capital Punishment?

[Inaudible reference deleted.]

[387] BY MRS. BUSH: Yes, if he's guilty . . . (inaudible).

BY MR. NECAISE: Ma'am?

BY MRS. BUSH: Yes, if he's guilty.

BY MR. NECAISE: But, you, are you saying that you don't know?

BY MRS. BUSH: No, I don't.

BY MR. NECAISE: You don't know whether one deserves it or not. Well, of course, you wouldn't know that until you heard the evidence.

BY MRS. BUSH: I mean, you know, I would, I would vote not guilty.

BY MR. NECAISE: You would vote not guilty, if you was on the Jury?

BY MRS. BUSH: That's right.

[388] BY MR. NECAISE: You mean you would vote not guilty as to what one of them, uh, about whether he committed the crime or not guilty as to whether he ought to get the Death Penalty?

BY MRS. BUSH: Not guilty as to whether he should get the Death Penalty. I don't think anybody should get the Death Penalty.

BY MR. NECAISE: You don't think anybody, ma'am?

BY MRS. BUSH: (Inaudible.)

BY MR. NECAISE: You don't think anybody ought to ever get the Death Penalty?

BY MRS. BUSH: I mean, the way the Jury is going now, what I'm saying is I would, I would vote not guilty.

BY MR. NECAISE: Right now, the way this Jury's going, you would put not guilty?

[389] BY MRS. BUSH: Yes, sir.

BY MR. NECAISE: Is that not guilty, you would . . . .

BY MRS. BUSH: (Interposing) I would, you know, I would vote not guilty on the Death Penalty.

BY MR. NECAISE: You would, in other words, you don't believe in the Death Penalty?

BY MRS. BUSH: No, sir, I don't.

BY MR. NECAISE: Is that in just this kind of case or any kind of case?

BY MRS. BUSH: Any kind of case.

BY MR. NECAISE: You just don't believe anybody ought to get the Death Penalty?

BY MRS. BUSH: Yes, sir.

[390] BY MR. NECAISE: You just don't believe that anybody ought to get the Death Penalty. Regardless of what the evidence is?

BY MRS. BUSH: I'm saying that I don't think anybody should get the Death Penalty.

BY MR. NECAISE: Regardless of what the evidence are, (sic) you don't believe anybody ought to be put to death for any type of crime that they've committed?

BY MRS. BUSH: Well, look here, I mean, I don't know whether he's guilty or not guilty. I can't say whether he's guilty or not guilty.

BY MR. NECAISE: I understand that. And we going to have to prove . . . .

BY MRS. BUSH: (Interposing) That's why, that's why I say I can't say that he should have the Death Penalty. I can't say that.

[391] BY MR. NECAISE: Let me ask you this, you are first going to be called upon to decide his guilt or innocence.

BY MRS. BUSH: (Inaudible.)

BY MR. NECAISE: And let's say that all twelve of you agree that he did it. Okay. Now, he's been convicted. All twelve of you have agreed that he's the one what killed him, killed Ronald Wojcik. And then you'll come out here and you'll hear some more evidence and you'll go back to that same room a second time and you'll decide whether he ought to get life or death. Now, at that time, could you vote for the Death Penalty?

BY MRS. BUSH: (Inaudible.)

BY MR. NECAISE: Ma'am?

BY MRS. BUSH: I don't think so.

BY MR. NECAISE: Well, is it, is it just this type of case, Mrs. Bush, or is it any case?

BY MRS. BUSH: It would be in any case.

BY MR. NECAISE: Well, are you telling me that no matter what type of crime occurred, no matter what type of crime occurred out here in the streets in the City of Gulfport, that if Mrs. Bush was brought up here to decide, along with eleven other folks, that that individual that committed that crime ought to get the Death Penalty, could you vote for the Death Penalty?

BY MRS. BUSH: No. sir.

BY MR. NECAISE: You could not, are you telling me now that you never would vote for the Death Penalty?

[393] BY MRS. BUSH: Yes, sir.

BY MR. NECAISE: Now, with her answer being in the negative, if the court please, we call upon the court again and ask the court to excuse her because of her conscientious scruples against Capital Punishment. . . .

BY THE COURT: (Interposing) I'll overrule you on that. Let her step down.

• • • •

(Off-the-record discussion between Mr. Necaise and Mr. Stegall.)

BY THE COURT: He used his challenge on her, peremptorily.

• • • •

[394] BY MR. NECAISE: Mrs. Price, Mary Price, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. PRICE: I don't believe in Capital Punishment.

BY MR. NECAISE: Are you telling me that where the evidence, where the law allows and the evidence warrants, that you could not, in fact, vote for the Death Penalty?

BY MRS. PRICE: I just don't think that the Death Penalty should be imposed.

BY MR. NECAISE: Are you telling me, Mrs. Price, [395] that you couldn't vote for the Death Penalty in this type of case or any type of case?

BY MRS. PRICE: In any type of case.

BY MR. NECAISE: Okay. Now, let me say this to you. I don't, uh, don't be embarrassed. You are perfectly entitled to that feeling, uh, and if that's your view, you are certainly entitled to it. I am certainly not trying to embarrass you. But, what I am looking for is twelve people who come into the Jury Box who say that if the evidence warrants and the law allows, that they could, in fact, impose the Death Penalty if they find those two, if the law allows and the evidence warrants. And, uh, but, you are, are you telling me that you couldn't, you could not, in this, not in any type, not in any type of case, regardless of what type of crime happened in the streets of the City of Gulfport, [396] that you could not, you could never vote, when they brought the individual in, who had been adjudged guilty, you could never vote to give he or she the extreme penalty of death, regardless of what the evidence showed?

BY MRS. PRICE: Well, it would depend upon the type of case and depending upon the facts.

BY MR. NECAISE: What type of case would it take? Give me a set of facts where you would vote to impose the Death Penalty.

BY MR. STEGALL: If it please the court, I object to that.

BY THE COURT: Overruled.

BY MR. NECAISE: Give me a set of facts, Mrs. Price, where, if you were seated on the Jury, and the person had been adjudged guilty, and you had heard [397] all the evidence and he had been adjudged guilty. And now it becomes time for you to decide the penalty phase. What type of evidence, what type of case would it have to be for you to vote for the Death Penalty?

BY MRS. PRICE: (No response.)

BY MR. NECAISE: Ma'am?

BY MRS. PRICE: You've confused me.

BY MR. NECAISE: Well, I don't, I'm sorry, I don't mean to confuse you and I apologize. I hope I'm not doing it. Am I?

BY MRS. PRICE: No, I'm just nervous.

BY MR. NECAISE: I know your nervous. Okay. Just settle down and just be calm. Did you understand my question?

[398] BY MRS. PRICE: You wanted to know what type of case, what facts it would take for me to be able to vote for the Death Penalty.

BY MR. NECAISE: Right. And that is a case where the law warrants it and the evidence allows it. You see, the law, it's not my law and it's not the Judge's law, we have to follow the law that the Legislature passes up there in Jackson and that the United States Supreme court says is the law, we have to take those laws and work with them. And, as you heard the Judge explain, not every person who kills someone can get the Death Penalty. But, if you kill someone while doing certain things, then you are subject to the Death Penalty, if the Jury so desires to impose the Death Penalty. And, what I'm trying to find out is that if this is a case that you find that the evidence allows and the law warrants, in this case, [399] the imposition of the Death Penalty, could you vote to give this Defendant, right here, the Death Penalty?

BY MRS. PRICE: I don't think I could.

BY MR. NECAISE: You don't think you could. Is that on this case or on any case?

BY MRS. PRICE: I don't think I could take it upon myself to vote for the Death Penalty for anybody.

BY MR. NECAISE: On any case?

BY MRS. PRICE: Yes, sir.

BY MR. NECAISE: Ma'am?

BY MRS. PRICE: Yes, sir, on any case.

BY MR. NECAISE: You could never vote for it. Now, if Your Honor please, we would [400] excuse, ask that the court, ask the court to excuse her for the same cause, we call upon the court to excuse her.

BY THE COURT: I'll overrule you.

• • • •

[401] BY MR. NECAISE: Now, let's see, you're going to have to help me. This is Mrs. Walker. Mrs. Walker, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. WALKER: (Inaudible.)

BY MR. NECAISE: Ma'am?

BY MRS. WALKER: I don't have any objection to it. But, I couldn't vote for it.

BY MR. NECAISE: You don't have any objections to it, but you just couldn't vote for it.?

[402] BY MRS. WALKER: No.

BY MR. NECAISE: It would be all right for somebody else to vote for it. But, you couldn't vote for it. Is that what you're telling me, Mrs. Walker?

BY MRS. WALKER: Yes, sir.

BY MR. NECAISE: You believe in it, but you couldn't vote for it?

BY MRS. WALKER: Yes, sir.

BY MR. NECAISE: Is that in this type, in this particular type case, Mrs. Walker, or in any type case?

BY MRS. WALKER: In any type case.

BY MR. NECAISE: Are you telling me that no matter what the evidence in this case would show, you could

never vote [403] for the Death Penalty in any kind of case?

BY MRS. WALKER: No, I couldn't.

BY MR. NECAISE: If the court please, we call upon the court again.

BY THE COURT: I'll overrule you again and let you use your peremptory.

BY MR. NECAISE: Judge, let me ask that the record state that in all of these I am taking exception to the court's ruling.

BY THE COURT: All right.

• • • •

[410] BY MR. NECAISE: All right, sir. Mr. Lassabe, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MR. LASSABE: Well, I. . . .

BY MR. NECAISE: (Interposing) Let me tell you this, let me say this to you before you answer that, Mr. Lassabe. I need to know whether you believe in that or whether you want to get off the Jury. You'd just rather not serve.

BY MR. LASSABE: I. . . .

[411] BY MR. NECAISE: (Interposing) And I want you to use that one on me, you know, because, quite frankly, I'm getting down close on my challenges now and I might go a different way if you tell me that you just would rather get off, you know.

BY MR. LASSABE: No, it wouldn't be that. I, I've never settled it in my own mind.

BY MR. NECAISE: You've never settled it in your own mind.

BY MR. LASSABE: No, sir, I haven't.

BY MR. NECAISE: Well, do you tell me then, Mr. Lassabe, do you believe you doubt you could, where the law allows and the evidence warrants it. . . .

BY MR. LASSABE: (Interposing) I believe in the law.

BY MR. NECAISE: I believe, you believe in the law. [412] All right, sir.

BY MR. LASSABE: Yes, sir.

BY MR. NECAISE: All right, sir. Do you believe in the law of Capital Punishment?

BY MR. LASSABE: Well, I would suppose so.

BY MR. NECAISE: Well, now, does Mr. Bennie Lassabe believe in the law, he believes in the law. But, does Mr. Bennie Lassabe believe that he could enforce that law?

BY MR. LASSABE: I don't know sir.

BY MR. NECAISE: Well, I don't either. And I just, you know, and I don't know, you know, uh, and, I don't know, you know, only you can answer that. Only you can look in your mind and say. Now, I understand that we've got to prove to you, beyond a reasonable doubt, I understand that. [413] And I understand that the burden of proof is on us. I understand all of that. But, what I want to known is if you get down to this case and this Jury finds this Defendant guilty of the crime with which he is charged, the court is then going to instruct you that this is a case whereby one of the penalties is death and the other is life. And, I am asking you, after you look at all of the evidence, if you find that this is a case that in Bennie Lassabe's opinion warrants the Death Penalty because the court has already told you that the court authorizes it, could you, in fact, vote for the Death Penalty?

BY MR. LASSABE: I don't know.

BY MR. NECAISE: You don't know.

BY MR. LASSABE: No, sir.

[414] BY MR. NECAISE: Well, is it in just this type of case or any case that you have that doubt?

BY MR. LASSABE: I just don't know.

BY MR. NECAISE: You just don't know.

BY MR. LASSABE: I just don't know what I would do.

BY MR. NECAISE: You just don't know what you would do. If the court please, we move the court to . . .

BY THE COURT: (Interposing) I'll overrule you on him, because he didn't even know.

BY MR. NECAISE: Yes, sir.

• • • •

[442] BY MR. NECAISE: Do you have any conscientious scruples against Capital Punishment when imposed by the law?

[443] BY MRS. PANNELL: I think I do.

BY MR. NECAISE: You think you do.

BY MRS. PANNELL: I think I do.

BY MR. NECAISE: In this type of case or in any case?

BY MRS. PANNELL: In any case.

BY MR. NECAISE: Are you telling me then that you cannot, under and circumstances, return a verdict that would be, that would impose the Death Penalty, regardless of what the evidence might show?

BY MRS. PANNELL: I could not.

BY MR. NECAISE: Even if the court told you that was the law, that one of the verdicts that you could return would be that [444] of the Death Penalty, you are telling me that you could not do that?

BY MRS. PANNELL: I don't believe I could.

BY MR. NECAISE: You say you don't believe you could?

BY MRS. PANNELL: I just don't believe in the Death Penalty.

BY MR. NECAISE: If Your Honor please, we . . .

BY THE COURT: (Interposing) Mrs. Pannell, how come you are against Capital Punishment?

BY MRS. PANNELL: I just don't know how I can say it. I just don't. . . .

BY THE COURT: (Interposing) Well, let me ask you something, is it religion or what is it, I mean, that you wouldn't follow the law if I, uh, if that was the law in a particular case?

[445] BY MRS. PANNELL: No, it's not religion.

BY THE COURT: Well, what is it, then?

BY MRS. PANNELL: It, uh, I just don't know. I might could, after evidence was presented. But, as I feel now, I. . . .

BY THE COURT: (Irterposing) I feel like you could, myself.

BY MR. NECAISE: Is the court overruling me?

BY THE COURT: I'll overrule you.

BY MR. NECAISE: Then, we move to strike.

BY THE COURT: All right. Step down, Mrs. Pannell. Now, I don't want nobody telling me that, just to get off the jury. Now, that's not being fair with me.

• • • •

[530] BY MR. NECAISE: All right. And do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. BOUNDS: I don't know.

BY MR. NECAISE: Well, I don't know either.

[531] BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Well, I mean, I don't know how you feel about it. I know how I feel about it. I believe in it. You know, if you asked me, I could vote to impose the Death Penalty. But, I'm not going to be allowed to vote on it. And, what I am trying to do is to find twelve people who tells (sic) me that they have no conscientious scruples against Capital Punishment when imposed by the law. Do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Are you telling me, Mrs. Bounds, that you could, if the evidence allows, if the evidence warrants and the law allows the imposition of the Death Penalty, that you [532] could, in fact, vote for the Death Penalty?

BY MRS. BOUNDS: Would you ask me that again?

BY MR. NECAISE: All right. If the evidence warrants it and the law allows it, I can tell you at the front end that the law, in this type of case, allows the imposition of the Death Penalty. The evidence will be a decision for you to make as to whether this type of evidence warrants the imposition of the Death Penalty.

BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Could I ask the Court to question Mrs. Bounds further?

BY THE COURT: Well, Mrs., uh, Bounds, the question is this, uh, I'll read it to you.

"Would you automatically vote [533] against the imposition of the Death Penalty without regard to any evidence that might be developed in the trial in this case?"

BY MRS. BOUNDS: I would try to listen to the case.

BY THE COURT: That's not answering my question. Uh, the question the question will be, should be answered yes or no. Now, I'll read it again. "Would you automatically vote against the imposition of the Death Penalty without regard to any evidence that might be developed in the trial in this case?"

BY MRS. BOUNDS: Read it again.

BY THE COURT: Huh?

BY MRS. BOUNDS: Would you read that over again?

BY THE COURT: All right, I'll read it again.

[534] Uh, now listen carefully to what I'm asking you. "Would you automatically vote against the imposition of the Death Penalty regardless of the evidence that might be developed in the trial of this case?

BY MRS. BOUNDS: No, sir.

BY THE COURT: You would not?

BY MRS. BOUNDS: No, sir.

BY THE COURT: All right. I take it then that you have no conscientious scruples against the imposition of it, when it's authorized by law, if you would not automatically vote against it?

BY MRS. BOUNDS: (No audible response.)

BY THE COURT: Nobody goes around. . . .

[535] BY MR. NECAISE: (Interposing) Judge, she was about to answer the Court on something. I don't know what it was.

BY THE COURT: What is it, Mrs. Bounds?

BY MRS. BOUNDS: I would do my best.

BY THE COURT: Well, that's not the question. . . .

BY MRS. BOUNDS: (Interposing, but inaudible as the Court continued talking, as Mrs. Bounds was talking.)

BY THE COURT: . . . as to whether you would do your best or not. Nobody's doubting your sincerity, Mrs. Bounds. And, uh, the law does not allow the Courts to go around, just willy-nilly, killing people because of crimes. Do you understand?

BY MRS. BOUNDS: (Inaudible.)

[536] BY THE COURT: It's certain types of crimes where it may be imposed and the question is simply this: "Would you automatically vote against the imposition of the Death Penalty regardless of any evidence that might be developed in the trial of this case?"

BY MRS. BOUNDS: No, sir, I don't think I would.

BY THE COURT: She said she wouldn't.

BY MR. NECAISE: No, sir. She said I don't think I would.

BY THE COURT: Answer me yes or no, Mrs. Bounds. If you're against it, say so. And if you're not, say you're not. You can say one or the other.

BY MRS. BOUNDS: No, sir.

BY THE COURT: No?

[537] BY MRS. BOUNDS: No, sir.

BY THE COURT: In other words, you do not have any conscientious scruples against the imposition of the Death Penalty, it it's authorized by law. Is that right?

BY MRS. BOUNDS: No.

BY THE COURT: No. Okay.

BY MR. NECAISE: Mrs. Bounds, if this is a case where you find, from the evidence that it warrants the imposition of the Death Penalty, could you go back there and vote for the Death Penalty in this case?

BY MR. STEGALL: Judge, I'm going to object to him continuing, she, the Court has explained to her fully. . . .

BY THE COURT: (Interposing) Overruled, one time.

[538] I'm not going to let him go much further though.

BY MR. STEGALL: Excuse me, Mr. Necaise.

BY MR. NECAISE: In this case, if the evidence warrants and the law allows, and you get back there . . . (inaudible) . . . and you all are back there, trying to decide whether this Defendant should suffer the penalty of death, and you find from the evidence that you've got laid there before you that, in your opinion, from what you've heard and what you've seen from the evidence, that this is a case that warrants this man dying in the gas chamber, could you vote that he should suffer the penalty of death?

BY MRS. BOUNDS: I have to say yes or no?

BY MR. NECAISE: Yes, Ma'am.

BY MRS. BOUNDS: How can I say that when I've never [539] experienced it?

BY MR. NECAISE: Well, what I am saying is could you listen to the evidence and if you find that this is a case, if the case warrants it—that's a decision you're going to have to make. If this is a case that you find, in your mind, okay, if this is a case, this is in your mind, if you think, if you come up with this conclusion, okay, this is a case that this person should suffer the Death Penalty, such horrible, atrocious, heinous crime, in my opinion, in Mrs. H. C. Bounds' opinion, this man should suffer the penalty of death, could you write down "Death Penalty"?

BY MRS. BOUNDS: I don't think I could.

BY MR. NECAISE: You don't think you could?

BY MRS. BOUNDS: I don't think I could.

BY MR. NECAISE: You could not! [540] Now, if Your Honor please, we. . . .

BY THE COURT: (Interposing) Well, I don't know whether she could or couldn't. She told me she could, a while ago.

BY MR. NECASIE: Well, all I can do, Judge, is go by what, by what the lady says. The Court's put, the Court has put the State in a precarious position by making us use our challenges when we clearly met the law in about six cases. On about six challenges that the Court has made us use. . . .

BY THE COURT: (Interposing) Well, I think I had one or two that. . . .

BY MR. NECAISE: (Interposing) I agree with you, Judge. There's two or them. . . .

BY THE COURT: . . . . just used that to get off of the Jury. At least one person that I'm positive of.

[541] BY MR. NECAISE: Well, I'm sorry that they did that, Judge.

BY THE COURT: All right. All right. Let me ask you the question again. Now, answer me yes or no and search your conscience on it because you, you, I know you're an honest and sincere person.

BY MRS. BOUNDS: I think I am.

BY THE COURT: And anybody that, uh, born and raised up in Scott County and goes to the Presbyterian Church is, uh, has got to be a good clean individual. All I want you to do is just search your own conscience and tell me, positively, give me a yes or no, to this and don't equivocate. The question, once again, is: "Would you automatically vote against the imposition of the Death [542] Penalty regardless of any evidence that might be developed in the trial of this case?" Now, take your time and think about it and answer it yes or no, Mrs. Bounds.

BY MRS. BOUNDS: No, sir.

BY THE COURT: You are positive its no?

BY MRS. BOUNDS: Yes.

BY THE COURT: Well, do you understand that, uh, you're telling me now that you can impose the Death Penalty?

BY MRS. BOUNDS: (No audible response.)

BY THE COURT: Do you understand that's what you are telling me?

BY MR. NECAISE: Judge, the lady does not understand [543] your questions.

BY THE COURT: Wait a minute, Mr. Necaise.

BY MR. STEGALL: Judge, I'm going to object to the District Attorney . . .

BY THE COURT: (Interposing) I've already, I've already set him down. I don't need any help from either of you. All right.

Do you realize that you've said, I'm afraid that a while ago you didn't understand my question, Mrs. Bounds. Do you realize that you have now told me that you could impose the Death Penalty?

BY MRS. BOUNDS: That I can impose the Death Penalty?

BY THE COURT: Yes, ma'am. That is what you just told me, if you understood the question.

[544] BY MRS. BOUNDS: Okay.

BY THE COURT: Now, can you or not?

BY MRS. BOUNDS: I thought you said can I vote against it.

BY THE COURT: No. Let me read it one more time. It's the same question now, Mrs. Bounds. "Would you automatically, would you automatically vote against the imposition of the Death Penalty regardless of any evidence that might be developed in the course of the trial?"

BY MRS. BOUNDS: (No response.)

BY THE COURT: The question is in the first few words—"Would you vote against". Is your answer to that yes or no?

BY MRS. BOUNDS: No.

[545] BY THE COURT: You would not vote against it?

BY MRS. BOUNDS: (No response.)

BY THE COURT. You could vote for the Death Penalty?

BY MRS. BOUNDS: I think I could.

BY THE COURT: All right. She says she can vote for the Death Penalty.

BY MR. NECAISE: Judge, I want to make a Motion now.

BY THE COURT: All right. Come to the Bench and make your Motion.

(At the Bench, with the Court, Counsel and Court Reporter present, and outside the hearing of the Jurors in the Box and of the Courtroom, the following proceedings were then had:

(BY MR. NECAISE: The State had exhausted their [546] peremptory challenges, their twelve peremptory challenges. And, of course, the State would not, the Court would not allow the State to excuse anybody who had conscientious scruples against Capital Punishment under any circumstances and would vote against the Death Penalty under and circumstances on five different Jurors, which we can give the Court their names, and the Court MADE us use our challenges. And now we get on one where the Court has, where she has equivocated and where she has said one time yes and one time no. And there's just no question about it that if we had another challenge, we would use it on this lady because as the Court can see she is very weak and indecisive about the question. And I ask the Court, because the Court has not followed this case, throughout the case, that you let us have another challenge in this case, in particular, on this woman and we can give you the ones on Ruiz, uh, Coker, uh, Arlean Walker, Annie Mae Bush, uh, Lassabe, Price [547] and, uh, who were very unequivocal, that they would not under any circumstances, would not vote to impose the Death Penalty.

(BY THE COURT: Well, I think that's right, I made you use about five of them that didn't equivocate. Uh, I never had no idea that we'd run into this many.

(BY MR. NECAISE: I didn't either, Judge.

(Discussion between Court and Counsel.

(BY MR. STEGALL: We're going to object to the granting of a thirteenth peremptory challenge. The Court has already ruled on the State's, uh, uh, arguments in previous attempts at challenges for cause and the granting of a thirteenth would, uh, be one in excess of that provided by law. And the Defendant would object, if, uh, . . .

(BY MR. NECAISE: Judge, I'm not asking you to give [548] us a thirteenth challenge. I'm asking the Court to change its ruling and use those, uh, for cause rather than having the Court, uh, rather than having the State to use its peremptories.

I'm asking the Court to, to change its ruling. . . .

(BY THE COURT: (Interposing) Well, I didn't examine them myself. Of course, I admit that they were unequivocal, about five of them, that answered you that way.

Go ask her if she'd vote guilty or not guilty, if she could vote guilty or not guilty and let's see what she says to that.

If she says, if she gets to equivocating on that, I'm going to let her off as a person who can't make up her mind.

(BY MR. STEGALL: Well, Judge, my, uh, we will respond, of course, subject to what happens here. . . .

[549] (BY THE COURT: (Interposing) All right. All right. Let's go.)

BY MR. NECAISE: Mrs. Bounds, do you feel like this is a case, and I don't, I certainly don't want you to think that I'm picking on you. But, uh, what we are

trying to do here is that we are trying to pick twelve people, uh, who we feel that, uh, would be fair and impartial persons, what we are looking for is people who could be fair and impartial and who could, if the evidence warranted it, could impose the Death Penalty because we feel that this a case that warrants the imposition of the Death Penalty. We know that the law allows it. And could you tell me, do you feel like you could reach a verdict in this case, either guilty or not guilty in this case?

BY MRS. BOUNDS: Could I reach a verdict?

[550] BY MR. NECAISE: A verdict.

BY MRS. BOUNDS: A verdict?

BY MR. NECAISE: Yes, ma'am.

BY MRS. BOUNDS: Either way?

BY MR. NECAISE: Yes, ma'am.

BY MRS. BOUNDS: Yes.

BY MR. NECAISE: You could reach a verdict of guilty or not guilty. Now, if that verdict was guilty and you felt that from the evidence that you used to find him guilty, that evidence which you had used to find him guilty, if you felt that that evidence was of such a heinous, atrocious and cruel manner, do you feel that you could vote for imposing the Death Penalty on this twenty-eight year old Defendant?

[551] BY MRS. BOUNDS: Yes.

BY MR. NECAISE: Ma'am?

BY MRS. BOUNDS: Yes.

BY MR. NECAISE: Judge, the lady says yes, but we could challenge her for cause.

BY MR. STEGALL: If it please the Court, I would like to point out that she has answered the question in the proper manner. . . .

BY THE COURT: (Interposing) You all approach the Bench. You all approach the Bench.

(At the Bench, with the Court, Counsel and the Court Reporter present, outside the hearing of the Jurors

in the Box and of the Courtroom, the following proceedings were then had:

(BY MR. STEGALL: She answered his question and, and, [552] she's answered his questions in exactly the proper manner. She obviously, would have some difficulty, as me or anybody else would, on a Death Penalty, but she said she could do it, if the facts justified it.

Now, Mr. Necaise never used the language of the case that you've been using in directing your questions to them, when he asked these people those questions.

(BY THE COURT: I don't believe he did, either, when you come right down to it. I don't believe you did, Albert.

(BY MR. NECAISE: I didn't use it, but I said could you, in any case, and they said we could not, in any case, we could not and I said, do you mean to tell me that if the law says that you could find this person guilty and sentence him to Life, you tell me that you wouldn't follow the law. No, we would not follow the law, if it meant giving him the Death Penalty. We would not, under any [553] circumstances. Remember, I even asked one woman, well, what kind of case would you vote for the Death Penalty and she said I don't know of any case that I'd vote for the Death Penalty. And I said give me an example, pick out the case. . . .

(BY THE COURT: (Interposing) I should have questioned them on this, I guess. . . .

(BY MR. NECAISE: (Unable to distinguish Mr. Necaise's remarks as the Court continued talking, at the same time.)

(BY THE COURT: . . . but I never had no idea it was going to. . . .

(BY MR. STEGALL: (Interposing) Disregarding the evidence. . . .

(BY THE COURT: . . . wind up in a mess like this. I'd hate to get a conviction and get it reversed because of this one woman. She can't make up her mind.

[554] Well, let the record show that the Court is of the firm opinion that there was at least five, even though I think there's around nine challenges been used by the District Attorney for cause, either eight or nine, all right, there was eight of them that had said that they were against Capital Punishment.

And I think there was, uh, five of those that were unequivocally opposed to it and answered, in substance, if not even stronger language than the question set forth in the Witherspoon case, uh, from the United States Supreme Court, uh, that I should, at this point, allow him to challenge this lady for cause. She is totally indecisive. I think she is totally indecisive. She says one thing one time and on thing another.

The Court is of the opinion that it cheated the State by making him, uh, use, uh, by making the District Attorney use his peremptory challenges in at least five instances. And I'm going to allow it in this particular case.

[555] (BY MR. STEGALL: Excuse her for cause?

(BY THE COURT: I'm going to excuse her.

(BY MR. STEGALL: Let me ask the Court this, is the Court of the opinion that, uh, that there has been a sufficient record. . . .

(BY THE COURT: (Interposing) I'm not going to add any to his challenges.

(BY MR. STEGALL: Okay. All right.

(BY THE COURT: I'm not going to go back and give him five more. I'm going to excuse her for cause.

(BY MR. STEGALL: Okay. All right.)

BY THE COURT: You can go, Mrs. Bounds, and call back tomorrow afternoon.

SUPREME COURT OF MISSISSIPPI

No. 55738

DAVID RANDOLPH GRAY

v.

STATE OF MISSISSIPPI

June 5, 1985

Rehearing Denied July 24, 1985

Defendant was convicted in the Circuit Court, Harrison County, J. Ruble Griffin, J., of capital murder and sentenced to death, and he appealed. The Supreme Court, Sullivan, J., held that: (1) defendant was not entitled to compel attendance of two prisoners to testify; (2) the State laid sufficient predicate to impeach its own witness; (3) evidence was not sufficient to allow a manslaughter conviction; (4) circumstantial evidence instructions were adequate; (5) admission of arrest and probation revocation forms for sentencing was permissible; (6) evidence was sufficient to allow death penalty for felony-murder; and (7) proportionality review did not require review of all capital murder cases. The court, in an opinion by Dan M. Lee, J., also held that trial court did not improperly exclude a prospective juror after State's exhaustion of peremptory challenges.

Affirmed.

Sullivan, J., dissented in part in an opinion joined by Patterson, C.J. and Robertson, J.

En Banc.

David Randolph Gray was indicted, along with Attina Marie Cannaday and Dawn Bushart, for capital murder for the kidnapping and homicide of one Ronald Wojcik, but tried separately. Gray's trial preceded Cannaday's, but her appeal was heard first. *Cannaday v. State*, 455 So.2d 713 (Miss. 1984). Gray's trial resulted in a guilty verdict and imposition of the death penalty. On appeal, he asserts that the trial court erred during the guilt phase in:

1. denying his motion for the return of two prisoners from Parchman to testify on his behalf;

2. overruling objections to the prosecutor using a prior inconsistent statement to impeach its own witness;

3. overruling a motion for mistrial after a state witness commented on Gray's right to remain silent;

4. failing to instruct the jury as to the elements of the underlying felony of kidnapping.

5. failing to grant a lesser included offense instruction on simple murder;

6. refusing to grant lesser included offense instructions on manslaughter and kidnapping; and

7. refusing certain circumstantial evidence instructions.

Gray asserts that the trial court erred in the sentencing phase in:

8. overruling his objection to admission into evidence of copies of an arrest warrant and revocation of probation form;

9. including in the sentencing instruction the aggravating circumstance of whether the murder was committed for pecuniary gain, and

10. failing to charge the jury to make the findings required by *Enmund v. Florida*.

Finally, Gray contends that our Supreme Court proportionality review:

11. is inadequate under the express terms of Mississippi Code Annotated § 99-19-105 (Supp.1984), and, in any event, his death sentence is disproportionate with other comparable cases.

Part I of the Court's opinion, authored by Justice Sullivan, will discuss these assignments of error.

Part II, authored by Justice Dan Lee, will address Gray's assertion that the trial court erred in:

12. excluding a prospective juror for cause in violation of his right to trial by an impartial jury.

FACTS

Some time after midnight on June 3, 1982, Ronald Wojcik and Sandra Sowash were awakened and forced by knifepoint from Wojcik's Biloxi apartment by Attina Cannaday, David Gray, and Dawn Bushart. All five got into Wojcik's van and Cannaday drove to a remote wooded area north of Gulfport.

On the way, Gray raped Sowash at knifepoint in the rear of the van.

After the van stopped, Cannaday told Wojcik to get out. When he hesitated, Gray pulled him out. Holding a butcher knife to Wojcik's back, Gray marched him 50 to 60 feet into the woods. Cannaady yelled "Kill him", and Gray yelled back for Cannaday to bring Sowash into the woods to him.

Sowash turned and ran down the road. Cannaday threw her knife at Sowash but the handle hit her in the back. Sowash hid at a nearby house, while Cannaday, Gray and Bushart fled to Slidell, Louisiana. At sunrise, the body of Ronald Wojcik was found with 19 stab wounds to the head, hands, upper body, and back.

Gray stated that after he yelled for Sowash to be brought out, Wojcik hit him. Dropping the knife, Gray had a fist fight with Wojcik in which Gray knocked him to the ground, breathless. Picking up the knife, Gray suddenly saw Cannaday who asked for the knife and

said she wanted to talk to Wojcik. Gray did so, telling her to say what she had to, but to make it fast. Gray then returned to the road. About five minutes later, Cannaday returned. He asked her what happened, and she replied, "Nothing, he got up and ran off." Gray denied using the butcher knife against Wojcik at any time during or after the fight. He said Cannaday did not return with the butcher knife. He likewise denied ever using either of the folding knives in his possession against Wojcik.

Sowash gave the police a detailed description of Wojciks' white van, as well as the name of Tina as a participant. Sheriff's deputies knew that Cannaday had connections in Slidell, Louisiana, and informed the Louisiana authorities to be on the lookout for the white van and occupants. Wojcik's wallet was found on the highway near Slidell.

Wojcik's van was sighted near Slidell, and Gray and one Timmy Page were arrested. Cannaday was arrested at Page's residence.

LAW

PART I

SULLIVAN, Justice, for the Court:

A. GUILT PHASE

1. REFUSAL TO SUMMON PRISONERS

Gray argues that the trial court's refusal to order the return of prisoners Halbert and Breland from Parchman to testify in his behalf violated his right under Mississippi Constitution Article 3, § 26, and United States Constitution Amendment VI, that in all criminal prosecutions the accused shall have the right ". . . to have compulsory process for obtaining witnesses in his favor . . . ." See *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Washington v. Texas*,

388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Gray filed a motion three days prior to trial requesting an order to return the two prisoners. The morning of trial, he offered in support of his motion a letter from Halbert stating that a prisoner (identified by defense counsel as Breland) was told by Cannaday while they were in the Biloxi jail that she had tried to cut of Wojcik's head. Gray argues that the sole basis for the trial judge's refusal was the expense of transporting the prisoners from Parchmen to the Gulf Coast.

The trial judge did refer to the expense of transferring prisoners in ruling on this motion, but the primary basis for overruling Gray's request was that the testimony of Breland as to what Cannaday told him would be inadmissible hearsay if offered to prove the truth of the fact asserted. *Murphy v. State*, 453 So.2d 1290, 1293-94 (Miss.1984). Also, any testimony by Halbert as to what Cannaday told Breland would be double hearsay, unless each link fits under an exception to the hearsay rule. *Id.* at 1294.

The judge recognized that if Cannaday took the stand as a witness, waived her Fifth Amendment right to remain silent, and denied that she took part in the murder, then Breland's testimony that she said she cut off Wojcik's head might have been admissible to impeach her testimony as a prior inconsistent statement. Therefore, the trial judge ruled that, if the proper predicate were laid for impeaching Cannaday, he would reconsider his ruling on the motion to transfer. The trial judge also was made aware that Breland had discussed the matter with defense counsel and said that, if brought back, he would not testify. At trial, Cannaday was called by Gray to testify but she invoked the Fifth Amendment right to remain silent on all matters concerning the murder.

The trial judge's refusal to order the attendance of the two prisoners was based on the lack of a colorable need for them to be summoned. The court correctly foresaw the fact that Cannaday, whose trial followed Gray's,

would choose to remain silent, so that no basis arose for Halbert and Breland to be summoned to give their otherwise inadmissible testimony. Even so, the trial court left its ruling open for reconsideration in the event that Cannaday's testimony allowed for impeachment. It has been observed that the accused's right to compulsory process is not absolute and the state may require a showing of some colorable need for persons to be summoned lest the right be abused. *Passman v. Blackburn*, 652 F.2d 559, 566 (5th Cir. 1981). The motion to return Halbert and Breland from Parchman was addressed to the trial court's sound discretion, and we cannot conclude that Gray has demonstrated that the court's ruling was so fundamentally unfair as to deprive him of due process of law. *See United States v. Wilson*, 732 F.2d 404, 412 (5th Cir.1984).

Gray's reliance on *Gradsky v. State*, 243 Miss. 379, 137 So.2d 820 (1962), is misplaced. In that case we held that a defendant may summon his own attorney to give evidence vital to his defense, even though it may cause the lawyer embarrassment or raise the appearance of an ethical violation. Unlike *Gradsky, supra*, the admissibility of evidence which Gray sought to introduce through the prisoners was contingent upon the laying of a proper predicate which failed to materialize. This assignment of error is without merit.

2. STATE IMPEACHING ITS OWN WITNESS

Gray argues that the state's use of prior statements to impeach its own witness, Timothy Page, was improper because it was not shown that Page's testimony took the state by surprise nor that Page was unexpectedly hostile. *Moffett v. State*, 456 So.2d 714 (Miss.1984). In *Moffett*, we affirmed that a party is prohibited from impeaching his own witness with a prior statement when he knows reasonably well in advance that the witness has repudiated the statement. *Id.* at 718-19. Applying the standard

in *Hall v. State*, 250 Miss. 253, 165 So.2d 345 (1964), we concluded that the state was not genuinely taken by surprise by witness Johnson's repudiation of his prior statement nor was Johnson unexpectedly hostile. *Id.*

In this case, Timothy Page was summoned from Louisiana by the state to testify against Gray about the events from the time of the arrival of the three suspects at Page's Slidell home until his arrest while riding with Gray in Wojcik's white van.

On direct examination, Page testified that he had noticed Gray had a skinned place on his hand, some "bad things on his knuckles" and a little blood on his elbow. Gray told Page that he got in a fight with a couple of men in a bar in Mississippi. Toward the end of direct examination, the state asked Page numerous leading questions, to which Page gave unresponsive answers. The state persisted, and Gray's objection to leading questions was sustained. The state asked Page if he remembered giving a statement. Gray objected to the state impeaching its own witness. The trial court sustained this objection and overruled the state's plea of surprise.

On redirect, the state returned to the leading form of questioning and pursued the matter of Gray's fight in a bar. Page said that all Gray said was he whipped them. The state asked, "Didn't he brag to you about . . .?", at which point Gray objected to the state continuing to lead its witness. The trial court sustained the objection and overruled requests to treat Page as a hostile witness. The state asked how Gray was acting, to which Page replied, "He was, uh, acting like nothing happened." The state offered to refresh Page's memory with his statement, to which defense counsel objected but the court let the state show Page this statement. Page said he recalled making the statement. Asked to read the statement, Page replied that he could not read. The state then asked Page if he made the following statement. Defense counsel's objection was overruled. The state read Page the following:

Q. Was there anything about David that seemed strange?

A. Yes, sir. When David handed me a drink of Jack Daniel's from the bottle, I don't remember which arm it was, but he had dried blood on his arm, just below his hand. And the opposite hand, his knuckles were skinned. It looked like to me he had cut his hand, hitting someone in the mouth or teeth. I asked him what had happened. And he said he had got into a fight somewhere in Mississippi with two dudes, and he was bragging about how bad he was . . .

Q. Anything you would like to add, at this time?

A. The dude, David, was real nervous. And when I was looking around, he didn't want me to look around too much inside of the van.

Page acknowledged making that statement and admitted that Gray appeared shaky. The state attempted to further question Page regarding his prior statement but the court refused to sustain the plea of surprise, because Page had been in the district attorney's office for two days. The prosecutor responded, "I didn't know he would lie. I thought he would testify like his statement." The judge on his own motion told the jury to disregard the district attorney's remarks.

In this case the trial court ruled that the state could not treat Page as a hostile witness, but in fact allowed the prosecutor to use Page's prior statement to the police to impeach his earlier assertion that Gray was acting like nothing had happened.

Gray contends that there could be no true surprise since the state had two days in which to question Page concerning his statement and did not do so. Gray further complains that after the trial court ruled adversely to the state, the proscutor accused Page of being a liar in the presence of the jury. Gray contends that the witness's prior statements had a prejudicial effect on his

sentencing determination and require reversal under *Cannaday v. State*, 455 So.2d 713 (Miss.1984).

We will first lay to rest the question of the prosecutor's remark. While the remark was improper, the trial judge corrected the matter instantly by admonishing the jury to disregard the comment. *Ratliff v. State*, 317 So.2d 403, 405-06 (Miss.1975); *Clanton v. State*, 279 So.2d 599 (Miss.1973).

This case can be distinguished from *Moffett*, *supra*, on its facts in that this record contains no indication that the witness Page ever informed the state or defense counsel that he would not testify in accordance with the statement he had given the police in Slidell. Indeed, it would have been surprising if the illiterate Page had informed anyone that he intended to testify differently from a statement which he could not read. We look now to *Hall v. State*, *supra*, to determine whether the prosecutor was surprised and the witness unexpectedly hostile. In the absence of any indication to the contrary, the state may genuinely not have expected Page to be hostile since he was a friend of Cannaday, not Gray. Page proved to be less than cooperative during his direct examination by the state, and the leading questions were due in part to Page's non-responsive answers. When, on redirect, Page said that Gray was acting like nothing happened, the state may genuinely have been surprised given the strength of his earlier statement that Gray was acting "real nervous" and did not want Page looking around in the van. Thus the state laid a predicate to impeach Page as an unexpectedly hostile witness.

Even were this not so, Page's trial testimony and out-of-court statement both corroborated Gray's version of the story, when Gray himself took the stand and testified. In fact, Page's testimony concerning Gray's fist fight would not have prejudiced Gray but rather bolstered his defense.

Gray's assertion that Page's statement that Gray bragged "about how bad he was" unduly prejudiced the

jury pales when compared with his co-defendant's admission, ruled inadmissible on appeal, that she tried to break off Wojcik's head. *Cannaday, supra*, at 721. We conclude that the state laid a predicate for impeaching Page with his prior statements and, even were this not so, the statements were not so inflammatory as to infect the sentencing phase of his trial. *Cannaday, supra*, at 724.

3. COMMENT ON GRAY'S RIGHT TO REMAIN SILENT

The incident in question occurred while the state was questioning Officer Joe Kennedy of the St. Tammany Parish sheriff's department, concerning his arrest of Gray:

> After you had advised them both of their rights, did you have occasion to ask either one of them or, in particular, David Gray, any questions?
>
> A. The only thing I asked Gray was, uh, about the ownership of the vehicle.
>
> Q. And did he respond to that question?
>
> A. He indicated that the van belonged to his girl friend.
>
> Q. Okay.
>
> Did he say anything further to you?
>
> A. He went on to state to me that, uh, that he knew his rights and he wasn't going to say anything. I told him. . . .
>
> BY MR. STEGALL:
>
> (Interposing) If it please the Court, I'm going to object to that and ask to approach the Bench.
>
> BY THE COURT: I sustain your objection.

Gray moved for a mistrial on the ground that the witness's testimony constituted a comment upon his exercise of his Fifth Amendment right to remain silent. The court overruled the motion. Gray did not request nor was he given a curative instruction at that time. In arguing that his death sentence should be vacated for improper comment on his failure to offer sworn testimony,

Gray argues that we should follow our holding in *Williams v. State*, 445 So.2d 798 (Miss.1984). This contention is based on a misunderstanding of our holding in *Williams*. The defendant in *Williams* was allowed to make an unsworn opening statement and the prosecutor commented to the jury in closing on the defendant's failure to give his version of the facts while under oath. We held in that case that it was not necessary to hold that this error standing alone constituted reversible error. Instead, we considered the combined influence of this error with two other improper comments by the prosecutor concerning appellate review and the possibility of parole. Taken together, we then held that their aggregate effect was to deny Williams a fair sentencing hearing. *Id.* at 801.

Evidence of post-arrest silence violates due process because it is fundamentally unfair to afford a suspect the right to remain silent and yet allow implications of his silence to be used against him. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). However, we recognized in *Austin v. State*, 384 So.2d 600, 601 (Miss. 1980), that a prosecutor's comment about a defendant's silence, though improper, was harmless error in view of the overwhelming evidence of guilt beyond reasonable doubt. See *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In this case, the single reference by the witness to Gray's intention to remain silent was neither repeated nor linked with Gray's exculpatory statement. Moreover, the trial judge charged the jury at the conclusion of trial that no adverse inference may be drawn by the invocation of the right to remain silent by a witness or an accused. These factors, together with the overwhelming evidence of guilt beyond reasonable doubt, lead us to conclude that the improper comment in this case was harmless error. *Austin v. State, supra, Chapman v. California, supra.*

Gray's invocation of *Williams v. State, supra*, is unpersuasive in that it was not solely the improper prosecutor's comment, but the aggregate effect of several distinct

improper arguments that required reversal of Williams' sentencing phase. This assignment of error is without merit.

4. FAILURE TO DEFINE ELEMENTS OF KIDNAPPING

The state did not offer nor did Gray request an instruction defining the elements of the underlying felony which elevates this murder to capital murder. *See* Miss. Code Ann. § 97-3-19(2)(e) (Supp. 1984). During the course of his testimony, Gray admitted to the forcible seizure and concealment of Sowash and Wojcik against their will. *Cf.* Miss.Code Ann. § 97-3-53 (Supp. 1984) (kidnapping). Gray argues that the trial court's failure to instruct the jury regarding the elements of kidnapping denied him due process of law in that the jury could hot determine his guilt or innocence of the crime charged unless given some legal guidance as to what are the elements of the crime of kidnapping. The absence of legal guidance, according to Gray, makes the jury's finding of guilt unreliable, contrary to the high level of reliability required in capital cases. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

There is no merit to this assignment of error because Gray makes no objection to the instructions offered by the state and, more importantly, failed to submit an instruction to the trial judge on the elements of kidnapping. The combined failure to object or to request an appropriate instruction operates to waive any objection on this issue. *Billiot v. State*, 454 So.2d 445, 462 (Miss. 1984); *Gilliard v. State*, 428 So.2d 576, 583 (Miss. 1983). This assignment of error is without merit.

5. FAILURE TO INSTRUCT THAT SIMPLE MURDER WAS LESSER INCLUDED OFFENSE

The trial court was never requested to instruct the jury on the lesser included offense of simple murder. *Newell v. State*, 308 So.2d 71 (Miss. 1975), holds that

the trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so. *Id.* at 78. This rationale has been applied by this Court in death penalty cases. *Gilliard v. State*, 428 So.2d 576, 583 (Miss. 1983). We cannot conjecture that the trial court would have refused Gray's proffered instruction on simple murder, had one been offered to him. There is no merit to this assignment.

6. REFUSAL TO INSTRUCT THAT MANSLAUGHTER AND KIDNAPPING WERE LESSER INCLUDED OFFENSES

During discussion of the jury instructions, Gray's attorney asked the court to permit him to draft a manslaughter instruction for submission as a lesser included offense on the ground that the jury could consider Gray's story to be true that he fought Wojcik and killed him in the heat of passion but without malice. The court ruled that even if defense counsel had it ready, it would not be granted under the facts of this case.

Gray argues that his testimony that Wojcik hit him and they engaged in a fist fight offers the basis for presenting to the jury the affirmative proposition that his actions were "without malice aforethought" and in the heat of passion. The state responds that, even taking the evidence in the light most favorable to Gray, there is no way that it could be said to support a finding that Gray killed Wojcik without malice aforethought and in the heat of passion. Gray armed himself and two others, abducted two people at knifepoint, took them into the woods north of Gulfport, led Wojcik into the woods at knifepoint, and then, accepting Gray's testimony, beat Wojcik to the ground breathless. He then supplied the knife to Cannaday and left Wojcik to her tender mercies.

A comparison of this case with *Lanier v. State*, 450 So.2d 69 (Miss. 1984), demonstrates what sort of proof

must be shown in order for a manslaughter instruction to be an appropriate lesser included offense. Lanier's confession indicated that he was accosted by a policeman late at night and made to remove all of his personal belongings from a bag. The officer having drawn his gun, reacted when Lanier removed his own weapon from the bag and the officer fired at Lanier. Lanier returned fire, hitting him. Certain physical evidence corroborating Lanier's confession was held to be sufficient to submit to the jury the question of whether Lanier, surprised by the police officer, killed him without malice aforethought and in the heat of passion. *Id.* at 79-81.

The well settled law in this state is that jury instructions are not given unless there is an evidentiary basis for such in the record. *Colburn v. State*, 431 So.2d 1111, 1114 (Miss. 1983); *Fairchild* v. *State*, 459 So.2d 793 (Miss. 1984). In our opinion, there is no evidentiary basis in the record for concluding that Gray acted in the heat of passion and without malice aforethought. Gray's entire testimony in the record is that he never stabbed Wojcik. If, by submitting the issue of manslaughter, Gray admits that he stabbed Wojcik, there does not appear to be anything in the record that changes the character of that killing from its malicious and premeditated origin. *See Fairchild v. State*, *supra*, at 801-02 (Miss. 1984). The trial court correctly rejected Gray's request for a manslaughter instruction.

As for Gray's requested instruction D-13 which would have permitted the jury to find him not guilty of capital murder but guilty of kidnapping, this Court resolved this precise issue involving an identical jury instruction against, Gray's co-defendant in *Cannaday v. State*, 455 So.2d at 724. We noted that murder and manslaughter may be lesser included offenses of capital murder, but kidnapping is not. *Id.* at 725. Therefore, there is no merit to the assignment that the trial court erred in refusing to grant the lesser included offense instruction on kidnapping.

7. REFUSAL OF CERTAIN CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS

Instruction D-4 told the jury that it does not have the right to convict upon mere suspicion nor upon the preponderance of the evidence but only upon evidence that he was guilty beyond all reasonable doubt and to a moral certainty and to the exclusion of every reasonable hypothesis consistent with innocence. The court refused this instruction and instead granted instruction C.18SC which informed the jury that the law presumes the defendant to be innocent and places the burden upon the state to prove him guilty of every material element of the crime beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence.

Instruction D-5 cautioned the jury not to indulge in speculation, conjecture, or guess-work. Further it instructed the jury that where there is a controverted issue of fact and the testimony fails to show beyond all reasonable doubt that the state's contention in regard to that issue is true, then the presumption of innocence controls. Instead, the court granted instruction C-1 which also informed the jury that its verdict should be based on the evidence and not upon speculation, guesswork or conjecture. The court also granted instruction D-8, which provided that if there are facts in the case susceptible of two interpretations, one favorable and the other unfavorable to the accused, and if there is a reasonable doubt as to the correct interpretation, then the jury must resolve the doubt in favor of the accused.

Finally, the court refused instruction D-11, which informed the jury that it did not have to explain its verdict to a living soul and that a verdict of acquittal will not mean that the jury is convinced of Gray's innocence but only that a reasonable doubt remains in their minds.

It is well settled in this state that where defendant's instructions on circumstantial evidence are properly covered by other instructions given by the court, the trial court will not be put in error for refusing to grant other

instructions on the same point using alternative language. *Bullock v. State*, 391 So.2d 601 (Miss. 1980); *Jones v. State*, 381 So.2d 983, 991 (Miss. 1980).

A very strong circumstantial evidence instruction was granted to Gray and read to the jury which accomplished essentially the same thing that any of the other refused instructions would have done. There was no error in refusing to grant the other circumstantial evidence instructions. We have carefully reviewed all of the assignments of error offered by Gray affecting the guilt phase of his trial and we find that none of them are meritorious. We, therefore, affirm the conviction of David Randolph Gray for the crime of capital murder.

B. SENTENCING PHASE

8. ADMISSION OF ARREST AND PROBATION REVOCATION FORMS

The state introduced into evidence at the sentencing hearing a commitment paper from Jones County indicating that Gray had been convicted of aggravated assault upon a law enforcement officer and had been placed on probation for three years. Attached to the commitment paper were the arrest warrant and probation revocation forms which indicated that he had committed another unnamed violation of law. Defense counsel objected to introduction of the order of the circuit court because of the additional writing on the bottom. This referred to the fact that the commitment paper indicated that Gray's probation was revoked and his three-year sentence was reinstated.

Gray argues that this evidence should not have been admitted at trial under the rule that proof of a crime different from that alleged in the indictment is not submissible against the accused. *Gray v. State*, 351 So.2d 1342, 1345 (Miss. 1977); *West v. State*, 463 So.2d 1048 (Miss. 1985). In *West*, we held it to be error for the

jury to see during the sentencing phase a copy of the defendant's Georgia conviction which recited that he had been found guilty of capital murder and sentenced to death. We found that this information impermissibly lessened the burden upon the jury as to whether their verdict was the only final determination on the question of whether the death penalty would be imposed upon West. *Id.* at 1052-53.

Gray further argues that the introduction of the probation revocation evidence was irrelevant to any of the aggravating circumstances the state was allowed to prove and was prejudicial because it suggested that Gray had committed other crimes. Gray further argues that he was not represented by counsel at the probation revocation hearing and, therefore, his Sixth Amendment right to counsel was violated.

The papers in question only showed that Gray did eventually serve time for the aggravated assault conviction, but do not reveal the crime for which his probation was revoked. Furthermore, the inference that Gray had committed another unnamed crime could not have prejudiced him in any way differently from his own admission from the witness stand of convictions for aggravated assault, grand larceny, and cattle theft. Gray admitted to the jury that he served around 28 months in prison and was last paroled from the penitentiary in August of 1981.

Gray's situation is readily distinguishable from *West v. State*, *supra*, because nothing in the probation revocation form indicated that Gray had already been sentenced to death, so that their admission could not have lessened the jury's burden in returning a second death sentence. The state properly points out in its argument that this record is completely silent as to whether Gray was represented by counsel at the probation revocation hearing and this Court will not act on such naked assertions.

9. INCLUDING PECUNIARY GAIN AS AN AGGRAVATING CIRCUMSTANCE

Under this assignment, Gray argues that there was a "doubling up" of aggravating circumstances when the trial court instructed the jury that it could consider both whether the murder was committed for pecuniary gain and whether it occurred during the course of the kidnapping. Gray contends that these two aggravating circumstances arose from the same aspect of the crime. This question has been decided adversely to Gray in *Jordan v. State*, 464 So.2d 475, 478-79 (Miss.1985), *Irving v. State*, 441 So.2d 846 (Miss.1983); *Hill v. State*, 432 So.2d 527 (Miss.1983); *Gilliard v. State*, 428 So.2d 576 (Miss. 1983); and *Smith v. State*, 419 So.2d 563 (Miss. 1982). In *Henry v. Wainwright*, 721 F.2d 990 (5th Cir. 1983), the Fifth Circuit Court of Appeals rejected this same constitutional argument holding that resolution of the issue was a question of state law.

There is no merit to this assignment of erorr.

10. INSTRUCTIONS REQUIRING ENMUND FINDINGS

Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (construed the Eighth Amendment to forbid imposition of the death penalty against "one who neither took life, attempted to take life, nor intended to take life". *Id.* at 786, 102 S.Ct. at 3371. Gray claims that his death sentence must be set aside because there was neither a finding nor sufficient evidence to support a finding that he killed or intended to kill Wojcik in the course of the kidnapping. Gray's conviction occurred prior to the amendment of the Mississippi Death Penalty statute to require the jury to make *Enmund* findings. *See* Miss.Code Ann. § 99-19-101(7) (Supp.1984).

Instruction S-1 at the guilt phase required the jury to make *Enmund* findings because in order to find Gray guilty the jury had to believe from the evidence beyond

a reasonable doubt that Gray did "unlawfully, wilfully, and feloniously and *of his malice aforethought* kill and murder . . . Ronald Wojcik, while engaged in the commission of the crime and felony of kidnapping." (emphasis added) Also, instruction S-3 told the jury that malice aforethought "is a predetermination to commit an act without legal justification or excuse." *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir.1982), holds that the "intent to commit" murder standard was met where identical instructions were given to those in the case *sub judice*. There the Court found that the charge to the jury that it could not convict appellant absent a finding that he intended to commit murder meant that the jury's verdict could be read only to reflect such a finding. *Id.* at 1076-77. The testimony of Gray reflected that Cananday asked Gray to get some knives and come with her to help scare her ex-boy friend Wojcik. Gray said that she asked him to kill Wojcik; he said he would help her scare Wojcik but would not kill him. Gray claimed after that he marched Wojcik at knifepoint into the woods, he was going to scare Wojcik and tell him to run. When they got into a fight, Gray punched Wojcik as hard as he could. Then, handing his butcher knife to Cannaday, Gray left.

In *Jones v. Thigpen*, 741 F.2d 805 (5th Cir. 1984), the Fifth Circuit reversed the defendant's conviction because there was no evidence indicating that the defendant killed or assisted his accomplice in killing the victim, or that he supplied the murder weapon, or even that he knew his accomplice intended that a killing occur. In that case, the Fifth Circuit said that, had the state introduced such evidence, the death penalty would not be disturbed. 741 F.2d at 817. In this case, Gray admitted that Cannaday told him she wanted Wojcik killed and that he, Gray, supplied Cannaday with the murder weapon after disabling the victim. This admission by Gray establishes the requisite personal culpability under *Enmund v. Florida*, and there is no merit to this assignment of error.

11. SUFFICIENCY OF PROPORTIONALITY REVIEW

We are urged by Gray that Mississippi Code Annotated § 99-19-105(3)(c) (Supp.1984), requires us to compare his death penalty with all capital murder cases, even though a life sentence is imposed and whether or not the case was even appealed to this Court. Gray further argues that we should compare appealed capital convictions where a life sentence was imposed with cases where the death penalty was imposed. Gray contends that a detailed examination and review of all capital murder cases is necessary to achieve the justice that the proportionality requirement envisions. We reject this contention. In *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), the Supreme Court of the United States held that such a review is not constitutionally mandated, being exclusively a question of state law. In *Gray v. Lucas*, 677 F.2d 1086 (5th Cir.1982), the Fifth Circuit said:

> Gray claims that the Mississippi Supreme Court's comparative review of death sentences is flawed since the Court only compared Gray's case with those cases where the death sentence had been imposed and not with all the cases where it could have been imposed. Because the Supreme Court has rejected a similar argument in *Proffitt v. Florida*, 428 U.S. 242, 258-59 fn. 16, 96 S.Ct. 2960, 2969-70 fn. 16, 49 L.Ed.2d 913 (1976), we reject this claim as well.

677 F.2d at 1111.

We find no basis in this assignment of error and it is rejected.

PART II

DAN M. LEE, Justice, for the Court:

12. EXCLUDING A PROSPECTIVE JUROR FOR CAUSE, IN VIOLATION OF HIS RIGHT TO TRIAL BY AN IMPARTIAL JURY

It may correctly be said that the right of an accused to be tried by a jury of his or her peers is the foundation of fairness and the hallmark of our judicial system. U.S. Const. Amend. VI; Miss. Const. art. III § 26. This Court and the United States Supreme Court have frequently written of the significance of the jury's role. See, *Fuselier v. State*, 468 So.2d 45 (1985); *Wiley v. State*, 449 So.2d 756 (Miss.1984); *Sanders v. State*, 440 So.2d 278 (Miss.1983) and *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). In fact, the jury is so engrained in our notion of a trial that it has become the subject of great drama such as Reginald Rose's Twelve Angry Men. Unfortunately the common place acceptance of the jury system sometimes results in taking that right for granted, making the importance of the jury's role not as readily appreciated by those who do not have a direct stake in the outcome of the proceedings. Every trial lawyer and judge is well aware of the difficulties posed by citizens reluctant to give of their time and attention to help administer our system of justice. It was just such reluctance which presented the trial court with some troublesome decisions in the instant case.

The voir dire of a jury is important in any case but especially so where the state seeks to impose the death penalty. The nature of the penalty and the strong personal convictions of many prospective jurors have resulted in voir dire proceedings unique to capital cases. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct.

2954, 57 L.Ed.2d 973, 9 Ohio Ops.3d 26 (1978); *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Wainwright v. Witt*, —— U.S. ——, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

In *Armstrong v. State*, 214 So.2d 589 (Miss.1968) this Court attempted to provide guidelines by which our trial courts could follow the dictates of *Witherspoon*:

> The proper method of bringing the death penalty to the attention of the special veniremen is for the trial judge to inform them that they have been summoned as veniremen in a capital case and that a verdict of guilty could result in the infliction of the death penalty. The judge should then ask them if any member of the panel has any conscientious scruples against the infliction of the death penalty, when the law authorizes it in proper cases, and where the testimony warrants it. If there are those who say that they are opposed to the death penalty, the trial judge should then go further and ask those veniremen, who have answered in the affirmative, whether or not they could, nevertheless, follow the testimony and the instructions of the court and return a verdict of guilty although that verdict could result in the death penalty, if they, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict. Those who say that they could follow the evidence and the instructions of the court should be retained, and those who cannot follow the instructions of the court should be released. The mere fact that a venireman is opposed to the death penalty does not disqualify him as a juryman, if he can do his duty as a citizen and juror and follow the instructions of the court, and where he is convinced of the defendant's guilt he can convict him although the verdict of the jury may result in the death penalty's being inflicted upon the defendant.

214 So.2d at 593.

Although the United States Supreme Court has refined the *Witherspoon* decision in *Adams*, the issue remains the ability of the prospective juror to follow the instructions and the juror's oath. The proper method of determining whether the prospective juror can do that is still for the *judge* to follow the procedure outlined in *Armstrong*. Unfortunately that did not occur in the present case and that failure ultimately combined with some prospective jurors' reluctance to serve to create the difficulties we now face.

The Harrison County District Attorney conducted the majority of the death penalty voir dire, with the circuit judge participating only when the questions and responses of Mrs. Bounds became so tangled that everyone involved admitted to being confused. That problem notwithstanding, the groundwork for Mrs. Bounds' removal was laid long before any questions were asked of her.

When the voir dire began several jurors expressed the sentiment that they had conscientious scruples against the death penalty and could not vote to inflict it under any circumstances. The trial judge refused to excuse those jurors for cause and required the state to exercise peremptory challenges to him. It is abundantly clear from the record that his reason for doing so was because he believed that the jurors were simply claiming to have conscientious scruples against the death penalty so that they could be released from jury service.[1] Confronted by what he believed to be insincere at-

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[1] This certainly highlights the problems that can be encountered when the trial court rules on each juror immediately after that juror's voir dire and in the presence of the other prospective veniremen. Jurors who wish to be excused are quick to learn what responses will get them excused. Such a procedure is not good practice and should be avoided.

testations of personal moral convictions, the trial court was unwilling to dismiss those jurors for cause even though their responses clearly indicated that they could properly be so dismissed both under *Witherspoon* and *Adams*.

By the time Mrs. Bounds was voir dired the state had already been forced to use all of its peremptory challenges. As stated above, Mrs. Bounds' voir dire was lengthy and confusing. Nonetheless she positively stated several times that she could vote for the death penalty should the circumstances warrant it. Although her responses were at times equivocal, she was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria. See *Fuselier, supra*.

Because of Mrs. Bounds' equivocation the state sought to excuse her and complained that the trial court had erroneously forced it to use all of its peremptory challenges. The trial judge responded by saying:

> Well, I think that's right. I made you use about five of them that didn't equivocate. Uh, I never had no idea that we'd run into this many.

The trial judge then directed the prosecution to resume questioning Mrs. Bounds in an effort to get an unequivocable response. She again replied that she could vote for the death penalty. The state then again requested that she be dismissed for cause. The court then ruled as follows:

> (BY THE COURT: (Interposing) I should have questioned them on this, I guess. . . .
>
> (BY [DISTRICT ATTORNEY]: (Unable to distinguish Mr. Necaise's remarks as the Court continued talking, at the same time.)
>
> (BY THE COURT: . . . but I never had no idea it was going to. . . .
>
> (BY [DEFENSE COUNSEL]: (Interposing) (Disregarding the evidence. . . .

> (BY THE COURT: . . . wind up in a mess like this. I'd hate to get a conviction and get it reversed because of this one woman. She can't make up her mind.
>
> Well, let the record show that the Court is of the firm opinion that there was at least five, even though I think there's around nine challenges been used by the District Attorney for cause, either eight or nine, all right, there was eight of them that had said that they were against Capital Punishment.
>
> And I think there was, uh, five of those that were unequivocally opposed to it and answered, in substance, if not even stronger language than the question set forth in the Witherspoon case, uh, from the United States Supreme Court, uh, that I should, at this point, allow him to challenge this lady for cause. She is totally indecisive. I think she is totally indecisive. She says one thing one time and one thing another.
>
> The Court is of the opinion that it cheated the State by making him, uh, use, uh, by making the District Attorney use his peremptory challenges in at least five instances. And I'm going to allow it in this particular case.
>
> (BY [DEFENSE COUNSEL]: Excuse her for cause?
>
> (BY THE COURT: I'm going to excuse her.
>
> (BY [DEFENSE COUNSEL]: Let me ask the Court this, is the Court of the opinion that, uh, that there has been a sufficient record. . . .
>
> (BY THE COURT: (Interposing) I'm not going to add any to his challenges.
>
> (BY [DEFENSE COUNSEL]: Okay. All right.
>
> (BY THE COURT: I'm not going to go back and give him five more. I'm going to excuse her for cause.

(BY [DEFENSE COUNSEL]: Okay. All right.)

(BY THE COURT: You can go, Mrs. Bounds, and call back tomorrow afternoon.

Although the route taken to Mrs. Bounds' dismissal was a circuitous one indeed, and most highly disfavored, it should be obvious to all that no prejudice occurred to the defendant Gray. The force and effect of the trial court's ruling was to correct an error he had committed in refusing to dismiss other jurors for cause after they had unequivocably stated that they could not vote to impose the death penalty in any circumstance. Certainly the state is entitled to a jury that can follow the instructions and juror's oath. *Adams, supra*; *Witt, supra*. That being the case the trial court was correct when it recognized the error in its prior rulings and took affirmative action to correct that error. We have recognized in numerous cases that a trial court should be afforded the opportunity to correct any errors at trial by way of a motion for a new trial. *House v. State*, 445 So.2d 815, 819 (Miss.1984); *Read v. State*, 430 So.2d 832, 838 (Miss.1983); *Johnson v. State*, 404 So.2d 553, 556 (Miss. 1981); *Tribbett v. State*, 394 So.2d 878, 880-81 (Miss. 1981).

There is no logical reason not to allow the trial court in this situation to correct its erroneous ruling prior to the empanelling of the jury and termination of trial. Notions of judicial economy make it clear that the trial court should be allowed to recognize and correct its error early in the proceedings, especially where as here, there could have been no possible prejudice to the defendant. That being the case, we find no merit to Gray's final assignment of error.

Finally, we have closely examined the record in the instant case and unequivocally find that Gray's murder of Wojcik warranted the death penalty. A comparison of this case with our cases decided after *Jackson v. State*, 337 So.2d 1242 (Miss.1976), in which the death penalty

has been imposed and upheld reveals that such penalty is neither wanton, freakish, excessive, nor disproportionate to the sentences imposed in those case. (See Appendix "A") His execution would be consistent and even handed with all the post-*Jackson* cases previously affirmed by us.

Based on all of the foregoing, we hereby affirm DAVID RANDOLPH GRAY'S verdict of guilty and sentence of death. That sentence is to be carried out in the manner prescribed by law on the 26th day of June, 1985.

AFFIRMED.

AS TO PART I: All Justices concur.

AS TO PART II: WALKER and ROY NOBLE LEE, P.JJ., and HAWKINS, PRATHER and ANDERSON, JJ., concur as to Part II.

PATTERSON, C.J., and SULLIVAN and ROBERTSON, JJ., dissent as to Part II.

APPENDIX "A"

DEATH PENALTY CASES AFFIRMED BY THIS COURT:

Johnson v. State, —— So.2d ——, No. 55,265, decided May 8, 1985, (not yet reported);
Cabello v. State, 471 So.2d 332 (Miss.1985);
Jordan v. State, 464 So.2d 475 (Miss.1985);
Wilcher v. State, 455 So.2d 727 (Miss.1984), and 448 So.2d 927 (Miss.1984);
Stringer v. State, 454 So.2d 468 (Miss.1984);
Billiot v. State, 454 So.2d 445 (Miss.1984);
Dufour v. State, 453 So.2d 337 (Miss.1984);
Neal v. State, 451 So.2d 743 (Miss.1984);
Booker v. State, 449 So.2d 209 (Miss.1984);
Caldwell v. State, 443 So.2d 806 (Miss. 1983);
Irving v. State, 441 So.2d 846 (Miss.1983) and 361 So.2d 1360 (Miss.1978);
Tokman v. State, 435 So.2d 664 (Miss.1983);
Leatherwood v. State, 435 So.2d 645 (Miss.1983);
Hill v. State, 432 So.2d 427 (Miss.1983);
Pruett v. State, 431 So.2d 1101 (Miss.1983);
Gilliard v. State, 428 So.2d 576 (Miss.1983);
Evans v. State, 422 So.2d 737 (Miss.1982);
King v. State, 421 So.2d 1009 (Miss.1982);
Wheat v. State, 420 So.2d 229 (Miss.1982);
Smith v. State, 419 So.2d 563 (Miss.1982);
Johnson v. State, 416 So.2d 383 (Miss.1982);
Edwards v. State, 413 So.2d 1007 (Miss.1982);
Bullock v. State, 391 So.2d 601 (Miss.1980);
Reddix v. State, 381 So.2d 999 (Miss.1980);
Jones v. State, 381 So.2d 983 (Miss.1980);
Culberson v. State, 379 So.2d 499 (Miss.1979);
Gray v. State, 375 So.2d 994 (Miss.1979);
Jordan v. State, 365 So.2d 1198 (Miss.1978);
Voyles v. State, 362 So.2d 1236 (Miss.1978);
Washington v. State, 361 So.2d 61 (Miss.1978);
Bell v. State, 360 So.2d 1206 (Miss.1978).

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT:

Edwards v. State, 441 So.2d 84 (Miss.1983);
Dycus v. State, 440 So.2d 246 (Miss.1983);
Coleman v. State, 378 So.2d 640 (Miss.1979).

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY:

Mhoon v. State, 464 So.2d 77 (Miss.1985);
Cannaday v. State, 455 So.2d 713 (Miss.1984);
Wiley v. State, 449 So.2d 756 (Miss.1984);
Williams v. State, 445 So.2d 798 (Miss.1984).

SULLIVAN, Justice, dissenting:

The majority admits that it would be error for the trial judge to excuse venire member Bounds for cause since "she was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria". *Ante* at 421. We are told that her excusal did not violate Gray's right to an impartial jury because the trial judge was actually correcting a prior erroneous ruling which deprived the state of a peremptory challenge.

With all deference to the majority, it contradicts the trial judge's very words to rule that Bounds was removed by a peremptory challenge. Furthermore, the law does not sanction the attempt to exercise leftover peremptory challenges to cure a violation of a capital defendant's right to trial by an impartial jury.

The record could not more plainly reflect that the basis for excusing juror Bounds was not a peremptory challenge, but a challenge for cause. At the conclusion of the colloquy quoted by the majority, *ante* at 422-423, the trial judge said: "I'm not going to add any to his challenges . . . I'm not going to go back and give him five more. I'm going to excuse her for cause." (Tr. at 555). Whatever may have been the "force and effect" of the trial court's ruling, he plainly stated that he was excluding venire member Bounds for cause.

The majority makes an appealing argument that the trial judge properly corrected a prior erroneous ruling concerning previous jurors who stated that they could not vote for the death penalty under any circumstances. The reason these jurors were originally excused, according to the majority, was that the trial judge believed that their answers were insincerely given in order to be released from jury service. If in fact these jurors were concealing an ability to serve on a capital murder case, then they could not any more be excused for cause consistent with *Adams* and *Witt* than Mrs. Bounds.

The underlying reasoning of the majority opinion is that excusal of juror Bounds for cause was harmless

error since the trial judge, in effect, gave the state back a previously exercised peremptory challenge. The problem is that *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976), requires us to conclude that dismissals for cause cannot be sanctioned as "harmless error", regardless of whether the state, at trial, could have peremptorily challenged the same juror. See *Burns v. Estelle*, 592 F.2d 1297 (5th Cir.1979), adhered en banc 626 F.2d 396 (5th Cir.1980), *Moore v. Estelle*, 670 F.2d 56 (5th Cir.1982), *Hance v. Zant*, 696 F.2d 940, 956 (11th Cir.1983); *Barfield v. Harris*, 540 F.Supp. 451, 465 (ED.N.C.1982); *Keeten v. Garrison*, 578 F.Supp. 1164, 1190 (WD.N.C.1984); *Chandler v. State*, 442 So. 2d 171, 175 (Fla.1983); *Blankenship v. State*, 280 S.E.2d 623, 624 (Ga.1981); *overruling Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642 (1978); *Grijalva v. State*, 614 S.W.2d 420 (Tx.Cr.App.1980) *en banc overruling Chambers v. State*, 568 S.W.2d 313 (Tx.Cr.App.1978); *People v. Velasquez*, 26 Cal.3d 425, 162 Cal.Rptr. 306, 606 P.2d 341 (1980); *In Re Anderson*, 69 Cal.2d 613, 73 Cal.Rptr. 21, 47 P.2d 117 (1968).

The case law holding that there can be harmless error in *Witherspoon* cases, such as when the state has not used all of its peremptory challenges, represents extremely doubtful authority, as it fails to follow the absolute rule of reversal mandated by *Davis v. Georgia*, referred to by Justice Rehnquist in his dissent as a *per se* rule. *Davis* announces a clear rule mandating reversal and the following cases which fail to adhere to it are ignoring the authoritative construction of the United States Supreme Court of the Federal right to trial by an impartial jury. *State v. Nicholson*, 437 So.2d 849 (La.1983); *Gall v. Commonwealth*, 607 S.W.2d 97 (Ky 1980); *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979); *People v. Moore*, 42 Ill.2d 73, 246 N.E.2d 299 (1969).

In conclusion, there can be no doubt that juror Bounds was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria. The majority errs in holding

that the trial judge did not excuse her for cause. Its attempts to justify the trial judge's error to a retroactive application of a peremptory challenge, clearly an unacceptable and unwise course to pursue in view of the clear authority to the contrary. I would rule that the trial court erred in excluding juror Bounds for cause, and this error requires reversal of Gray's death sentence for a new sentencing trial. See *Granviel v. Estelle*, 655 F.2d 673 (5th Cir.1981). I would adhere to the ruling in *Davis v. Georgia*, that a violation of *Adams* and *Witt* is *per se* grounds for reversal, and cannot be excused as harmless error.

PATTERSON, C.J., and ROBERTSON, J., join in this dissent.

SUPREME COURT OF MISSISSIPPI

55,738

DAVID RANDOLPH GRAY

v.

STATE OF MISSISSIPPI

WEDNESDAY, JULY 24, 1985, COURT SITTING:

This cause this day came on to be heard on Petition for Rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order that said petition be and the same is hereby denied.

SUPREME COURT OF THE UNITED STATES

No. 85-5454

DAVID RANDOLPH GRAY, PETITIONER

v.

MISSISSIPPI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 24, 1986

Supreme Court, U.S.
FILED
APR 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5454 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DAVID RANDOLPH GRAY,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ Of Certiorari To the Mississippi Supreme Court

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether it was error for the Mississippi Supreme Court to affirm Petitioner's sentence of death by holding that the improper excusal for cause of a juror was harmless, contrary to *Davis* v. *Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

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OPINION OF THE COURT BELOW

The opinion of the Mississippi Supreme Court is reported at *Gray* v. *Mississippi*, 472 So.2d 409 (Miss. 1985).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the Accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Fourteenth Amendment, United States Constitution:

1. Citizenship rights not to be abridged by States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

STATEMENT OF THE CASE

A. Procedural History

Selection of a jury and commencement of Petitioner's capital murder trial occurred on August 9, 1982. Petitioner was convicted and sentenced to death on August 12, 1982.

The Mississippi Supreme Court entered its opinion, en banc, on June 5, 1985. The Mississippi Supreme Court affirmed Petitioner's conviction and sentence of death.

The Court was divided, 6 to 3, on the issue presented herein.

Petitioner requested rehearing by the Mississippi Supreme Court. Said request was denied on July 24, 1985.

Petitioner applied for certiorari to the Mississippi Supreme Court on September 25, 1985. This Court granted Petitioner's application and request to proceed in forma pauperis on February 24, 1986.

B. Statement Of Facts

The issue presented for review in this matter relates solely to the Mississippi Supreme Court's finding that the erroneous excusal for cause of a prospective juror was harmless. Petitioner does not contest his conviction here. Thus, the factual allegations and assertions made by the State (herein, respondent, the State of Mississippi, shall be referred to as "State") and Petitioner at trial are not relevant and are not presented here. The circumstances of the voir dire are relevant and are presented in detail.

The jury selection in this capital murder case took less than one day. The procedure employed by the trial court involved seating 12 potential jurors in the jury box. At first, the Court questioned the venire preliminarily as to knowledge of the case and bias. The Court explained that the proper test to be accepted as jurors "is that [the jurors] come into the Box without any bias, prejudice or feeling, with no desire to do anything other than to return a verdict to which the evidence might conduct you." (Transcript of the trial, hereafter abbreviated, "T"., 336). The prosecution was then permitted to question the 12 prospective jurors seated in the box. Later, the court dispensed with its preliminary questioning and the prosecutor took over this role.

Motions to strike jurors for cause were made and ruled upon as the basis for the challenge developed. (See, e.g., Joint Appendix, hereafter "JA____.," 3). Peremptory strikes were exercised by the State in two ways. At times, the prosecutor exercised a peremptory challenge immediately after his challenge for cause was overruled. The prosecutor also exercised peremptory challenges when he finished each round of questions to the venire. (See, e.g., T. 439-440).

After the State completed its questions, the stricken members of the venire were replaced and the prosecutor was permitted to question the new jurors and exercise peremptory challenges against them. (See, e.g., T. 456).

This process continued until the prosecution was satisfied with the twelve empanelled jurors. The defense then followed the same procedure. After the defense was satisfied, the prosecution was permitted to question any jurors not previously questioned by him. The prosecution also was able to exercise strikes against any of the new members of the panel.[1] The procedure was then repeated until both sides agreed to the twelve jurors seated in the box.

The potential jurors in this matter were questioned in each other's presence. Although questioning, for the most part, was directed to individual jurors, each prospective juror was able to hear the questions and responses previously made and was able to learn the ramifications of particular responses.

---

[1] It is clear that the parties could not go back and strike members of the panel that were previously accepted. At one point, the trial court even accused a group of previously accepted jurors from the courtroom so that they would not be required to listen to the repetitive voir dire. (T. 561).

The prosecutor questioned each potential juror extensively concerning that juror's conscientious scruples against the imposition of the death penalty. Any prospective juror who showed the least bit of equivocation was challenged for cause, and where overruled, peremptorily stricken. (See, e.g., JA 4-5).

During the voir dire, the trial court noticed that certain prospective jurors claimed to have conscientious scruples against the death penalty simply as a means to gain excusal from the case. The judge complained to the venire that they were not being fair in this regard (JA 16).

Several prospective jurors were challenged for cause by the State. (JA 3, 5, 6, 9, 12, 14, 16). The Court denied the State's motions and the State decided to strike each of these jurors peremptorily. Id. One cause challenge relative to scruples against the death penalty was granted. (T. 506).

"It is abundantly clear from the record that [the trial judge's] reason for [refusing to strike these jurors for cause] was because he believed that the jurors were simply claiming to have conscientious scruples against the death penalty so that they could be released from jury service." *Gray*, 472 So.2d at 421 (footnote omitted).

The trial court was in a position to observe the demeanor of the prospective jurors and the tenor of their responses. The Mississippi Supreme Court accepted the trial court's factual findings concerning the credibility of the prospective jurors. The trial judge's findings are certainly supported by the record.

The attempts to avoid jury service were obvious. Even the prosecutor recognized the fact that prospective jurors claimed to have stronger conscientous scruples than perhaps they actually had. The following comment was made

by the prosecutor to venireman Lassabe, one of the prospective jurors that the trial court refused to excuse for cause.

> Let me tell you this, let me say this to you before you answer, Mr. Lassabe. I need to know whether you believe in that or whether you want to get off the Jury, you'd just rather not serve. (JA 13).

Mr. Lassabe denied that he was trying to avoid jury service. Rather, he claimed that he had just simply "never settled it in [his] own mind." (JA 13).

The prosecution, nonetheless, moved to strike Mr. Lassabe for cause. (JA 15). The trial court overruled the challenge (JA 15) and the State struck Mr. Lassabe peremptorily. (JA 15).

It is clear that the trial court understood and exercised its fact-finding function. The trial court's ruling, excusing prospective juror, Schleh, is apposite on this point. Mrs. Schleh stated that she could never vote to impose the death penalty in any case. Her testimony was credited and she was stricken for cause. (T. 504-506).

Problems arose for the trial court, however, when it came time to question prospective juror, Mrs. H. C. Bounds. The trial judge struck Mrs. Bounds for cause (JA 26). The Mississippi Supreme Court unanimously found this ruling constituted error. *Gray*, 472 So.2d 422 and 424.

Initially, Mrs. Bounds was questioned by the prosecutor. He asked, "And do you have any conscientious scruples against capital punishment when imposed by law?" (JA 16) Mrs. Bounds responded, "I don't know." (JA 16)

The next few questions posed by the prosecutor were long and confusing. Finally, the prosecutor asked the trial court to intercede.

The trial court then asked Mrs. Bounds a proper question, "Would you automatically vote against the imposition of the death penalty without regard to any evidence that might be developed in the trial in this case?" (JA 17). Mrs. Bounds responded that "[she] would try to listen to the case." (JA 17).

The Court then directed Mrs. Bounds to answer the question yes or no. The question was reread to Mrs. Bounds twice so that she was sure to understand it. In response Mrs. Bounds stated, "No, sir." (JA 17). She would not automatically vote against the death penalty.

Later, Mrs. Bounds went on to say that she would do her best. The Court credited Mrs. Bounds' testimony and stated that "[n]obody's doubting your sincerity, Mrs. Bounds." (JA 18).

The same question was then put to Mrs. Bounds again by the court. This time she answered "No, sir, I don't think I would." (JA 18). The prosecutor complained that Mrs. Bounds had couched her response in equivocal terms. The question was then put to Mrs. Bounds by the court two more times. Each time she responded, "No." (JA 18).

Over defense objection, the prosecutor was permitted to question Mrs. Bounds once again on the same issue. Again, the prosecutor's questions were lengthy and confusing and met with equivocal responses.

Yet again, the trial judge put the proper question to Mrs. Bounds prefacing the question by reasserting his belief in Mrs. Bounds' honesty and sincerity. After clarifying the question, Mrs. Bounds was asked if she had such conscientious scruples that would cause her to automatically vote against the death penalty. Mrs. Bounds

responded in the negative and further stated that she thought she could vote for the death penalty. (JA 22).

The prosecutor then asked the court to reverse one of its previous rulings that denied a challenge for cause against prospective jurors Ruiz, Coker, Arlean Walker, Annie Mae Bush, Lassabe, or Price because by this point the State had used all of its allotted peremptory challenges. (JA 22).

The trial court reponded to the State's motion by instructing the prosecutor to:

> Go ask her if she'd vote guilty or not guilty, she could vote guilty or not guilty and let's see what she says to that. If she says, if she gets to equivocating on that, *I'm going to let her off as a person who can't make up her mind*. (JA 23). (Emphasis added)

Mrs. Bounds was asked by the prosecutor if she could reach a verdict one way or the other and responded that she could do so. (JA 24).

> The prosecutor then asked Mrs. Bounds:
>
> You could reach a verdict of guilty or not guilty. Now, if that verdict was guilty and you felt that from the evidence that you used to find him guilty, that evidence which you had used to find him guilty, if you felt that that evidence was of such a heinous, atrocious and cruel manner, do you feel that you could vote for imposing the death penalty on this 28 year old defendant? (JA 24).
>
> Mrs. Bounds responded "Yes." (JA 24).

The prosecutor then moved to challenge Mrs. Bounds for cause. Over objection, Mrs. Bounds was excused for cause. (JA 25-26).

SUMMARY OF ARGUMENT

A. The Mississippi Supreme Court unanimously found that one juror had been erroneously excused for cause. The Court, nonetheless, found this error to have been harmless. The Court found the error harmless because it believed that other rulings of the trial court, refusing to strike jurors for cause, improperly resulted in the State being required to exercise all of its allotted peremptory challenges. Had the State not been required to use all of its peremptory challenges, at least one challenge would have remained to challenge the juror improperly excused by the trial court. This premise of the Mississippi Supreme Court fails of its own accord. The trial court's refusal to strike certain jurors for cause was not erroneous. The trial court found that jurors claimed to have scruples against the imposition of the death penalty simply as a means of avoiding jury service. The Mississippi Supreme Court credited this finding of fact. The trial court's rulings, based on his findings of credibility, were correct. Thus, the prosecution did not have any peremptory challenges remaining.

B. Assuming *arguendo* that any peremptory challenges remained in the hands of the State, this cannot render the erroneous excusal of a juror harmless. Appellate courts cannot speculate as to the curative effect, if any, of remaining challenges. It is fundamentally unfair to indulge in such speculation when attempting to determine whether such an error is harmless or not.

C. The function of a jury in determining which capital defendant should live or die is so unique and so closely related to the morals and conscience of the community from which the jury is drawn that it is not appropriate to review the erroneous exclusion of prospective jurors on a harmless error basis. An appellate court should not substitute its judgment for that of a jury's. The nature of the jury's decision and the inability to fairly review the harm caused by an erroneous exclusion mandates a per se approach.

ARGUMENT

A. THE MISSISSIPPI SUPREME COURT'S PREMISE THAT THE ERRONEOUS EXCUSAL FOR CAUSE OF A JUROR WAS HARMLESS BECAUSE THIS RULING, IN EFFECT, ONLY CORRECTED PRIOR RULINGS REFUSING TO STRIKE OTHER JURORS FAILS OF ITS OWN ACCORD BECAUSE THE PRIOR RULINGS, THAT REFUSED TO STRIKE JURORS WHO CLAIMED TO HAVE CONSCIENTIOUS SCRUPLES AS A MEANS TO AVOID JURY SERVICE, WERE CORRECT.

The Mississippi Supreme Court unanimously found that the exclusion of Mrs. Bounds was error.

> "Mrs. Bounds' voir dire was lengthy and confusing. Nonetheless, she positively stated several times that she could vote for the death penalty should the circumstances warrant it. Although her responses were at times equivocal, she was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria. *Gray* v. *Mississippi*, 472 So.2nd 409, 422 (Mississippi, 1985).

The six member majority of the Mississippi Supreme Court, however, went on to find that the improper excusal of Mrs. Bounds was harmless. The majority considered the error harmless because "[t]he force and effect of the trial court's ruling was to correct an error he had committed in refusing to dismiss other jurors for cause after they had unequivocally stated that they could not vote to impose the death penalty in any circumstance." 472 So.2d at 422-423.

The Mississippi Supreme Court's rationale for finding the *Witherspoon*[2] error harmless was clearly premised on the belief that the trial court erred in refusing to strike five previously challenged jurors for cause. Once the trial court overruled the State's challenges for cause, the State then was "forced" to challenge these jurors peremptorily. Thus, the rationale continues, had the trial court stricken the previous jurors for cause, the State would not have been required to use all of its allotted peremptory challenges and would have had at least one remaining with which it could have excused Mrs. Bounds without creating any error.

The Mississippi Supreme Court rationale is a variant of the argument that unexercised peremptory challenges render erroneous exclusions for cause harmless. This argument was rejected in *Davis* v. *Georgia*, 429 U.S. 122, 97, S.Ct. 399, 50 LEd.2d 339, (1976).

For reasons discussed in the next section of this argument, this Court should maintain the precedent of *Davis*. However, before considering the propriety of *Davis*, this Court must consider the factual circumstances of the case now before it and determine whether it is even necessary to consider *Davis* under these facts.

As previously stated, the Mississippi Supreme Court's opinion is premised on the idea that the trial court erred in failing to excuse five jurors who expressed conscientious scruples against the imposition of the death penalty.[3] The

[2] *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1779, 20 L.Ed.2d 776 (1968).

[3] The Mississippi Supreme Court's rationale actually has two parts. First, the trial court erred in refusing the requested challenges for cause. Second, this refusal required the State to exercise its peremptory challenges. While this portion of Appellant's argument focuses on the first part of the rationale because it is factually incorrect, the second part of the rationale fails as a logical matter. The trial court's rulings did not force the State to exhaust its peremptory challenges. The State did so of its own accord.

trial court's rulings, however, were not erroneous.

The trial judge, who was present to observe the demeanor of the jurors and the tenor of their responses, did not credit the claims of conscientious scruples voiced by the jurors. Rather, the court believed the jurors used these insincere attestations as a means of avoiding service on the jury. The Mississippi Supreme Court recognized and accepted these factual findings.

> When the voir dire began several jurors expressed the sentiment that they had conscientious scruples against the death penalty and could not vote to inflict it under any circumstances. The trial judge refused to excuse those jurors for cause and required the state to exercise peremptory challenges to them. *It is abundantly clear from the record that his reason for doing so was because he believed that the jurors were simply claiming to have conscientious scruples against the death penalty so that they could be released from jury service.* 472 S2d at 421 (Footnote omitted) (Emphasis added.)

The trial court found jurors' claims of conscientious scruples not to have been credible. A juror that does not *honestly* maintain views that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," *Wainwright* v. *Witt*, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841, 851-852 (1985), should not be stricken.

In *Witt*, although in a slightly different context, this Court recognized that "deference is to be paid to the trial judge who sees and hears the juror." *Witt*, 83 L.Ed.2d at

853. "[T]he question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind . . . such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Witt*, 83 L.Ed.2d at 854. (Footnote omitted).

Although these comments on judicial deference are contained in the portion of the *Witt* opinion that considered the deference due a trial court on federal review under 28 U.S.C. 2254, the reason for granting the trial court such deference applies equally here. "[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below on such a question of fact, except in a clear case." *Reynolds* v. *U.S.*, 98 U.S. 145, 156-157, 25 L.Ed 244 (1878) [Cited in *Witt*, 83 L.Ed.2d at 854].

The trial judge here exercised his traditional fact finding function when he refused to strike the challenged jurors for cause. The court affirmed its previous rulings during the questioning of Mrs. Bounds.[4]

The Mississippi Supreme Court's affirmance of Petitioner's sentence of death ignores the ten year old precedent of *Davis* v. *Georgia*, supra. The Mississippi Supreme

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[4] The prosecution complained that the Court's refusal to strike prospective jurors Ruiz, Coker, Walker, Bush, Lassabe and Price was error (JA 22) and that the Court should reverse its rulings. (JA 23). The court refused, "I'm not going to add any to [the prosecutor's] challenges . . . I'm not going to go back and give him five more. I'm going to excuse [Mrs. Bounds] for cause." (JA 26).

Court's decision to ignore *Davis* was based upon a reading of the records that its own opinion reveals as being clearly erroneous.

On the facts of this case, this Court should not even begin to consider the propriety of the rule set out in *Davis*. It should follow the dictates of *Witt*, credit the trial judge's findings of fact and hold that there were not circumstances present in the voir dire of Petitioner's case that could have rendered the erroneous exclusion of Mrs. Bounds harmless. Petitioner's sentence of death should be reversed.

B. THE ASSUMPTION THAT A PROSECUTOR AT TRIAL WOULD HAVE EXERCISED UNUSED PEREMPTORY CHALLENGES AGAINST JURORS HAD THEY NOT BEEN ERRONEOUSLY EXCUSED FOR CAUSE IS MUCH TOO SPECULATIVE TO RENDER THE ERRONEOUS EXCUSALS HARMLESS.

No circumstance that exists in the record of this case can justify a finding that the erroneous excusal of Mrs. Bounds was harmless. However, as this Court may find it necessary to address the precedent of *Davis* v. *Georgia*, supra, Petitioner here sets out the factors that support the continued validity of the ten year old precedent of *Davis*.

In *Davis*, a six member majority of this Court reversed the Supreme Court of Georgia's affirmance of Appellant, Davis' sentence of death. The Georgia Supreme Court had held that, "[t]he rationale of *Witherspoon* and its progeny is not violated where merely one of a qualified class or group is excluded where it is shown, as here, that others of such a group were qualified to serve." 236 Ga. 804, 809-810, 225 S.E.2d 241, 244-245, (Cited in *Davis*, 429 U.S. at 123).

This Court expressly rejected the Georgia Supreme Court's rationale. "Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,' [*Witherspoon*] 351 U.S. at 522 n.21, 88 S.Ct. at 1777, he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand." *Davis*, 429 U.S. at 124.

Witherspoon prohibited the imposition of a sentence of death by a jury "chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 88 S.Ct. at 1777. Such a jury was considered a "hanging jury." Id. 391 U.S. at 523. The state was flatly prohibited from "stack[ing] the deck" in such a fashion, *ibid.*, to enhance the likelihood of executions.

Witherspoon was subsequently modified in *Wainwright* v. *Witt*, supra. *Witt* held *Witherspoon* to have been fact specific. 83 L.Ed.2d 847-848. The Illinois sentencing procedure considered in *Witherspoon* vested the jury

> with unlimited discretion in choice of sentence. Given this discretion, a juror willing to consider the death penalty arguably was able to "follow the law and abide by his oath" in choosing the proper sentence. Nothing more was required. Under this understanding the only veniremembers who could be deemed excludable where those who would never vote for the death sentence or who could not impartially judge guilt. *Witt*, 83 L.Ed.2d at 850. (Emphasis omitted).

Given the limitations placed upon sentencing discretion after *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and *Gregg* v. *Georgia*, 428 U.S. 153, 96

S.Ct. 2909, 49 L.Ed.2d 859 (1976); the Court in *Witt* found the *Witherspoon* standard for exclusion of scrupled jurors inappropriate. The Court in *Witt*, however, did nothing to change the consequence of an improper exclusion. It only changed the standard for exclusion. "[I]f a venireman is improperly excluded . . . any subsequently imposed death penalty cannot stand. *Davis*, 429 U.S. at 124, 97 S.Ct. 15 400.[5]

Prior to *Davis*, in 1970, the United States Court of Appeals for the Fifth Circuit considered, for the first time, the consequences of the improper exclusion of a juror from a capital murder trial. *Marion* v. *Beto*, 434 F.2d 29 (5th Cir. 1970). In his opinion, Judge Simpson described some of the factors considered by the court in reaching its conclusion that the improper exclusion of even a single venireman requires reversal.

> The magnitude of a decision to take a human life is probably unparalled in the human experience of a member of a civilized society; indeed, many agree on moral or religious grounds that it is incomprehensible that an advanced society such as ours should yet engage in such practice. Given the weightiness of the subject involved it really does not follow that the improper exclusion of a relatively small number of the total veniremen examined does not prejudice the defendant's rights to an impartial cross-section of the community. Where, as here, unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life or death for a

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[5] As previously stated, the standard for exclusion of veniremen has been converted so as to exclude anyone whose views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 83 L.Ed.2d at 852 (Footnote omitted.)

> defendant. Although a defendant certainly has no assurance that a properly empaneled jury will not impose the death penalty, it seems to us that in light of the vast difference in treatment which may result from the improper exclusion of a single venireman, even that degree of error is prejudicial to the rights of a defendant in a capital case. 434 F.2d at 32 (Footnote omitted.)[6]

In addition to *Marion* v. *Beto*, a number of other courts have considered the proper consequences of the erroneous exclusion of scrupled veniremen. Some upheld the sentences of death on the theory that the presence of unused peremptory challenges rendered any errors harmless. A plethora of these cases were summarily reversed by this Court. See, *Wigglesworth* v. *Ohio*, 19 Ohio St. 2d 171, 181, 248 N.E.2d 607, 614 (1969) (one erroneous exclusion, 5 or 6 unused peremptories), *rev'd*, 403 U.S. 947 (1971), cited in *Davis* v. *Georgia*, *supra*. 429 U.S. at 123; *Harris* v. *Texas*, 457 S.W.2d 903, 908, 909 n.3 (Tex. Crim. App. 1970) (one erroneous exclusion, 4 unused peremptories), *rev'd*, *403 U.S. 947 (1971)*, *cited in Davis* v. *Georgia*, *supra*, 429 U.S. at 123; *Whan* v. *Texas*, 438 S.W.2d 918, 920 (Tex. Crim. App. 1969) (one or two erroneous exclusions, 14 unused peremptories), *rev'd*, 403 U.S. 946 (1971); *Ladetto* v. *Massachusetts*, 356 Mass. 541, 544, 254 N.E.2d 415, 417 (1969) (3 erroneous exclusions, 33 unused peremptories, *rev'd*, 403 U.S. 947 (1971); *Speck* v. *Illinois*, 41 Ill. 2d 177, 213-14, 242 N.E.2d 208, 227-28 (1968) (50 erroneous exclusions, 79 unused peremptories), *rev'd*, 403 U.S. 946 (1971); *Bernette* v. *Illinois* and *Tajra* v. *Illinois*, 45 Ill. 2d 227, 232, 258 N.E.2d 793, 796 (1970) (12

[6] The Mississippi sentencing scheme, as the Texas scheme under consideration in *Marion* v. *Beto*, supra, requires that a sentence of death be unanimous. Miss. Code Ann. 99-19-101(3).

erroneous exclusions, 33 unused peremptories), *rev'd*, 403 U.S. 947 (1971); *Mathis* v. *New Jersey*, 52 N.J. 238, 251, 245 A.2d 20, 27 (1968) (3 erroneous exclusions, 5 unused peremptories), *rev'd*, 403 U.S. 946 (1971). Other courts, in opinions written by jurists with substantial experience either as trial counsel or as trial judges, have rejected the notion that the reservation of peremptory challenges renders the erroneous exclusion of jurors harmless. See, e.g., *Moore* v. *Estelle*, 670 F.2d 56 (5th Cir. 1982).

The theory that the presence of unused peremptory challenges negates the harm of an erroneous exclusion was rejected prior to *Davis*, by *Davis*[7] and should be rejected today. Even without questioning the sincerity of prosecutors, appellate courts should not "countenance what amounts to an attempt to exercise retroactively . . . peremptory challenges reserved at the time [of trial]." *Moore* v. *Estelle*, 670 F2d at 57. (Gee, Circuit Judge). "What would have happened [if a juror had not been erroneously stricken for cause] is seldom a subject of satisfactory proof. . . ." Id.

Adoption of such a methodology for examining *Witherspoon* issues would be fundamentally unfair and render review of this issue meaningless. *Grijalva* v. *State*, 614 S.W.2d 420 (Tex. Cr. App. 1981) (Odom, J.). First, reservation of challenges for exercise on appeal would give prosecutors an unfair advantage. Rather than exercising his challenges in a give and take fashion with the defense, as was required in the instant case, a prosecutor could save a few challenges to be exercised after everyone has

[7] In his dissenting opinion in *Davis*, Justice Rehnquist took issue with the majority opinion on the question of unused peremptory challenges. 429 U.S. at 125, 97 S.Ct. at 400.

gone home. Then, with the benefit of 20/20 hindsight, he could "cure" any error that might have occurred.

Second, it is not difficult to imagine prosecutors taking advantage of a decision that reverses *Davis*. Every prosecutor in a capital murder trial would then save one or two peremptory challenges for use by appellate counsel. No case could be meaningfully reviewed.

An alternative, and perhaps even more compelling argument against adoption of an unused peremptories--harmless error rule was advanced by Judge Goldberg in his concurrence in *Moore* v. *Estelle*, supra. Judge Goldberg reasoned that the crucial question was not the affect of the erroneous ruling on a particular venireman. Rather, the erroneous ruling affected the composition of the entire jury.

> The proper focus of our inquiry is whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error. While it may be true that the exclusion of a particular venireman was not affected by the trial court's erroneous ruling, it does not necessarily follow that the composition of the entire jury panel was unaffected by the error.

In Texas capital cases, veniremen are examined seriatum by the defense and prosecution. "[P]rospective jurors . . . are examined individually and must be challenged and passed upon separately." *Pierson* v. *State*, 614 S.W.2d 102, 107 (1981). Thus, as a prospective juror comes before the court, the prosecutor must then and there decide whether she will accept the juror, challenge for cause, or exhaust one of her limited number of peremptories. Clearly, the prosecutor's strategic calculus is affected by the number of peremptory challenges left to her and by the number of jury panelists still awaiting selection. As the prosecutor depletes her limited number of

peremptory challenges, she may be willing to accept certain jurors she might have otherwise rejected given a larger reserve of peremptories.

The import of this observation should be clear. Texas claims that it would have used three of its peremptory challenges to exclude the three jurors found to have been improperly excused for cause. However, even if we assume that the prosecutor in this case would have used those three additional peremptory challenges, how can we know beyond a reasonable doubt that the selection of the remainder of the jury panel would have been unaffected? If the trial court had ruled properly and the prosecution had been forced to use these three additional peremptory challenges, it is entirely possible that the State would have chosen to acquiesce in the impaneling of other prospective jurors it actually challenged given the luxury of a pocketful of "peremptories." 670 F.2d at 58 (Emphasis in original).

A variant of a seriatum examination of the venire was employed at Petitioner's trial. Rather than accept or challenge veniremen one at a time, counsel here accepted or challenged finite groups of veniremen. Once a member of a group had been accepted, he or she could not later be challenged. Thus, Judge Goldberg's reasoning is appropriate here. Erroneous exclusions of jurors affect the "strategic calculus" of the exercise of peremptory challenges and impact upon the selection of a panel of jurors as a whole.

1. The Nature Of A Jury's Sentencing Decision And The Inability To Fairly Review The Harm Caused By An Erroneous Exclusion Mandates A Per Se Approach.

Finally, the erroneous exclusion of a scrupled juror is not susceptible to any form of harmless error analysis. The erroneous exclusion should require reversal of a sen-

tence of death per se. The nature of the jury's decision and the inability to fairly review the harm caused by an erroneous exclusion mandates a per se approach.[8]

In Mississippi, a sentence of death must be pronounced by a jury. Miss. Code Ann. § 99-19-101(1). Its verdict must be unanimous. Miss. Code. Ann. § 99-19-101(3). Though not unguided, a Mississippi sentencing jury exercises a discretionary balancing function in deciding to impose a sentence of life or death. Id. The jury is required to balance aggravating factors against mitigating factors; neither of which are limited by those delineated in the statute. Miss. Code. Ann. § 99-19-101 (In the proceeding, evidence may be presented as to any matter that the court deems relevant to [the] sentence. . . .); *Barclay* v. *Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134, *reh den* 464 U.S. 874 (1983).

Deciding whether a defendant should live or die, even under a system that guides a jury's discretion, is nothing like the factual determination made by juries in determining guilt or innocence. Even under sentencing schemes that are more restrictive than that in Mississippi, the jury exercises significant discretion (e.g. Texas' statutory scheme of three questions). "This process is not an exact science, and the jurors . . . unavoidably exercise a range of judgment and discretion while remaining true to their

[8] This court has adopted a per se approach in other areas as well. See, e.g., *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel) and *Tumey* v. *Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (right to impartial judge); and *Vasquez* v. *Hillery*, 54 U.S.L.W. 4069 (Decided January 14, 1986) (Marshall, Brennan, Blackmun and Stevens, JJ.) (improper exclusion of grand jurors).

instructions and oaths." *Adams* v. *Texas*, 448 U.S. 38, 47, 100 S.Ct. 2521, 2527, 65 L.Ed.2d 581 (1980).[9]

Review of a sentence of death is not similar to the review of a record to determine if an error was harmless beyond a reasonable doubt. See, *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In reviewing the improper excusal of a juror, an appellate court cannot excise erroneously admitted evidence and then comb the record on a factual search. The decision to sentence a man or woman to death is not a factual determination. It is a moral one. *Barclay*, 463 U.S. at 951, 103 S.Ct. at 3419, 71 L.Ed.2d at 1144. ("It is entirely fitting for the moral, factual, and legal judgments of judges and juries to play a meaningful role in sentencing.")

An appellate court cannot find that the manner in which a killing occurred outweighs the youth of the killer. Or, that the fact of a defendant's sub-standard intellect does not outweigh the fact that he killed in the course of a robbery. These delicate balances are not for an appellate court to make. Be they ultimately proven right or wrong, these decisions belong to the consciences and morals of the diverse communities in the various states that have enacted capital punishment statutes. This Court, under the guise of harmless error analysis, must not become the ultimate arbitor of who lives and dies.

"The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the *factual* question of the defendant's guilt or innocence [cite omitted] and promotes public respect for the criminal

[9] "It is hard to imagine a system of capital sentencing that leaves less discretion in the hands of the jury [than that employed in Texas]. . . ." *Adams*, 448 U.S. at 465, 100 S.Ct. at 2530 (Rehnquist, J. dissenting).

process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 54 U.S.L.W. 4347, 4349 (Decided April 7, 1986). (Citation omitted) (Emphasis added.)

The decision to impose a sentence of death is not factual; it involves the delicate balancing of a series of intangible factors. Further, the alteration of the composition of a jury by the improper exclusion of veniremen is not immaterial. On issues of morality, if nowhere else, jurors are not fungible.

This Court should not use the instant case as an opportunity to reverse *Davis*. Instead, this Court should reaffirm *Davis* and reverse Petitioner's sentence of death.

CONCLUSION

For the foregoing reasons, this Court should reverse Petitioner's sentence of death and remand the cause for a new sentencing hearing.

Respectfully submitted,

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NO. 85-5454

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DAVID RANDOLPH GRAY
Petitioner

vs.

STATE OF MISSISSIPPI
Respondent

On Writ of Certiorari To The Supreme Court of the State of Mississippi

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

1. WHETHER IT WAS ERROR FOR THE MISSISSIPPI SUPREME COURT TO AFFIRM PETITIONER'S SENTENCE OF DEATH BY HOLDING THAT THE EXCUSAL OF A JUROR WAS HARMLESS.

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BRIEF FOR THE RESPONDENT

I. OPINION BELOW

The opinion of the Mississippi Supreme Court is reported as Gray v. State, 472 So.2d 409 (Miss. 1985), and is set out as Appendix A to the Petition for a Writ of Certiorari in this case.

II. JURISDICTION

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. § 1257 (3) challenging the constitutionality of his sentence of death.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner has adequately identified the pertinent constitutional provisions and statutes involved.

IV. STATEMENT OF THE CASE

Petitioner, David Gray, was indicted for the crime of capital murder and as being an habitual offender by the Grand Jury of the Circuit Court of Harrison County, Mississippi, First Judicial District during the June 1982 Term of said court. Petitioner's bifurcated trial was conducted according to the dictates of Miss. Code Ann. §99-19-101 et seq (Supp. 1977) and Jackson v. State, 337 So.2d 1242 (Miss. 1976). After hearing all the evidence during the guilt phase and deliberating thereon the jury returned a verdict of guilty of capital murder. Thereupon the sentencing hearing was conducted before the jury. After hearing the evidence adduced in aggravation and mitigation of sentence the jury retired and considered their verdict. After due consideration the jury returned a sentence of death.

On automatic appeal to the Mississippi Supreme Court the conviction and sentence were affirmed on June 5, 1985. Gray v. State, 472 So.2d 409 (Miss. 1985). A petition for rehearing was denied on July 24, 1985. From this decision petitioner filed his petition for writ of certiorari to the Mississippi Supreme Court. This petition was granted on February 24, 1986.

V. STATEMENT OF THE FACTS

On the evening of June 2, 1982 David Gray met Attina Marie Cannaday, his friend of approximately a month, in the Red Garter Lounge in Biloxi, Mississippi. Gray and Cannaday both met, for the first time, Dawn Bushart. They only knew her as the "fat girl". The trio drank and danced for most evening. Sometime during the evening Cannaday asked Gray if he would do his "sister" a favor. The favor was to beat or rough up her former "old man" who

"done her wrong." Cannaday then mentioned killing the former boy friend, Ronald Wojcik, and Gray balked. The subject of killing was dropped for the time and the trio left for Wojcik's apartment. Gray's car was not operating so the group set out on foot after first stopping by the car to pick up four knives. Cannaday wanted a gun to scare Wojcik, but the only weapons Gray could furnish were the knives.

After having traveled on foot for a distance Cannaday became tired of walking and turned to the oncoming traffic, pulled her shirt up exposing her breast. The display had the desired effect and the three were soon riding to their destination in the company of two men. When they arrived at the Beachview Apartments, Wojcik's home, the knives were distributed. Cannaday opened the front door with a key she had retained when Wojcik threw her out after discovering out she was only

sixteen years old. Gray and Cannaday entered the apartment, leaving Bushart on the porch to keep watch.

Cannaday went into the bedroom, turned on the light and began screaming at Wojcik and his new girlfriend, Sandra Sowash. Cannaday ordered Wojcik out of the bedroom at knife point and Gray went into the bedroom to guard Sowash. Gray told Sowash that he was Cannaday's "brother" and that Wojcik, the "m----- f----- hurt her and now he's gonna be hurt." Sowash began crying and Gray told her that she was not going to get hurt if she did not do anything wrong. All this time Cannaday and Wojcik were arguing in the living room. Cannaday brought Wojcik back into the bedroom and began ransacking the apartment looking for Wojcik's gun. She began throwing things about, breaking a mirror and other items, but never finding the gun because she covered it up in her mad search.

Gray and Cannaday ordered Wojcik and Sowash out of the apartment to where Bushart was waiting. Wojcik and Sowash were then ordered into Wojcik's van at knife point, leaving Wojcik's two children asleep in the apartment.

The fatal journey began with Cannaday driving, Gray in the passenger seat and the other three in the rear of the van. Cannaday heard Wojcik and Sowash talking, fearful of an escape attempt she told Gray to switch places with Wojcik. Cannaday almost overturned the van while going around a curve because she was driving at such an excessive rate of speed. Wojcik asked Cannaday to slow down only to be told not to tell her how to drive. Cannaday increased her speed. At one point Cannaday attempted to beat a train at a crossing only to have a collision avoided when Wojcik grabbed the sterring wheel swerving the van out of

harms way. In response to this action by Wojcik, Gray told Bushart to "cut him" if he moved again.

Gray then began making sexual advances toward Sowash. Gray told Sowash to take her clothes off or he would cut them off, Sowash complied. Encouraged by Cannaday and Bushart, he raped Sowash while everyone watched.

Cannaday drove them to a wooded area on Lampkin Road, just off Three Rivers Road in rural Harrison County, Mississippi. Gray got out of the van and ordered Wojcik and Sowash out. Bushart told Sowash that she should "say goodbye to [Wojcik] 'cause this is the last time you'll see him alive." Wojcik began trying to talk Gray and company out of harming he and Sowash. In response Gray grabbed Wojcik by the arm and said, "come on, m----- f-----, let's go." Wojcik was forced by Gray at knife point into the woods. Sowash then tried reasoning with Cannaday, pleading for their

lives. Cannaday told her "that's too bad cause he's going to get killed." Cannaday began yelling to Gray, "kill him, kill him now." Gray yelled back, "bring the bitch out here now." Sowash broke away from Cannaday and ran. Cannaday threw a knife stricking her in the back, but not harming her. She ran to a nearby house seeking help. When no one answered the door she hid under a wagon.

Cannaday went out into the woods to help Gray finish killing Wojcik. She cut his throat and attempted to remove his head for a keepsake.

Gray and Cannaday got back in the van with Bushart they made a brief search of the area for Sowash but did not locate her. The trio fled the area. On the way to Slidell, Louisiana Bushart asked to be let out of the van. Gray and Cannaday continued on to Slidell. Gray was arrested, driving Wojcik's van around noon on June 3, 1982 in Slidell.

The pants Gray was wearing when arrested had type "B" blood on the right leg, the same type as Wojcik's.

VI. SUMMARY OF THE ARGUMENT

The ruling of the Mississippi Supreme Court, while reaching the correct result, misapplied Wainwright v. Witt, 469 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), in not giving due deference to the trial courts finding that Juror Bounds was excusable for cause for being totally indecisive. Even if the court below was correct in its application of Witt, the Mississippi Supreme Court properly held that the trial judge was allowed to correct errors he made during the voir dire examination prior to petitioner's trial and in that there was no prejudice to the petitioner.

The recent rulings of this court in Rose v. Clark, ___ U.S.___, 46 CCH S.Ct. Bull P.

B4382 (July 2, 1986), Delaware v. Van Arsdall, 475 U.S.___, 89 L.Ed.2d 674, 106 S.Ct. ___ (1986) and Wainwright v. Witt, supra, show that there is no reason to continue to interpret Davis v. Georgia, 429 U.S. 122 (1976), as creating a per se rule inquiring reversal when there is an error in jury selection concerning death qualification. This Court has held that there is "nothing talismanic about juror exclusion under Witherspoon merely because it involves capital sentencing juries." This being the case there is no reason that a harmless error analysis could not be employed in cases concerning jury selection in this case.

VII. ARGUMENT AND AUTHORITY

IT WAS NOT ERROR FOR THE MISSISSIPPI SUPREME COURT TO AFFIRM PETITIONER'S SENTENCE OF DEATH BY HOLDING THAT THE EXCUSAL OF A JUROR WAS HARMLESS.

A. THE COURT BELOW WAS PROPER IN UPHOLDING THE TRIAL COURT'S CORRECTION OF ITS OWN ERRORS IN VOIR DIRE.

This case, if nothing else, is the prime exemplar of what Wainwright v. Witt, 469 U.S. ___, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985), was meant to correct. The requirement by Witherspoon v. Illinois, 391 U.S.510 (1968), of "unequivocal" answers, "automatic" decision making and"unmistakable clarity" to questions concerning conscientious scruples against the death penalty clearly created the "mess" that appears of record in this case.

Petitioner would have this Court determine the issue without reconsidering its per curium ruling in Davis v. Georgia, 429 U.S. 122 (1976). To achieve this end petitioner asks the Court to pay deference to the finding of the trial court "who was present to observe the demeanor of the jurors and the tenor of their responses." Brief at 11. He then relies, however, on the incorrect interpretation of the

trial courts ruling by Mississippi Supreme Court. The language in the state court opinion relied on by petitioner is as follows:

> When the voir dire began several jurors expressed the sentiment that they had conscientious scruples against the death penalty and could not vote to inflict it under any circumstances The trial judge refused to excuse those jurors for cause and required the state to exercise peremptory challenges to them. It is abundantly clear from the record that his reason for doing so is because he believed that the jurors were simply claiming to have conscientious scruples against the death penalty so that they could be released from jury service. [Footnote omitted]
>
> [Emphasis added] 472 So.2d at 421.

The record does not reflect this to be the reason for making the State use peremptory challenges to excuse these jurors. In fact the trial judge states there was only one juror that fell into that category. Respondents invite the Courts attention to the words of the transcript, which reads as follows:

> BY MR. NECAISE: Well, all I can do, Judge is go by what,by what the lady says. The Court's put, the Court has put the State in a precarious position by making us use our challenges when we clearly met the law in about six cases. On about six challenges that the Court has made us use . . .
>
> BY THE COURT: (Interposing) Well, I think I had one or two that . . .
>
> BY MR. NECAISE: (Interposing) I agree with you, Judge. There's two of them . . .
>
> BY THE COURT: . . . just used that to get off of the Jury. At least one person that I'm positive of.
>
> BY MR. NECAISE: Well, I'm sorry that they did that, Judge.
>
> [Emphasis added] Tr. Vol. IV, p. 540-41; App. at 20.

This excerpt from the transcript makes it abundantly clear that the reason for excusal ascribed by the Mississippi Supreme Court to the trial court was not in actuality the reason he refused to excuse the five jurors for cause. In fact when we look to the questioning of Juror Pannell we find the juror to which the trial court was referring. App. 15-16. Further we find the trial court recognizing its

error when confronted with Juror Bound's equivocation. The transcript reads:

> BY MR. NECAISE: The State had exhausted their peremptory challenges, their twelve peremptory challenges. And, of course, the State would not, the Court would not allow the State to excuse anybody who had conscientious scruples against Capital Punishment under any circumstances and would vote against the Death Penalty under any circumstances on five different Jurors, which we can give the Court their names, and the Court MADE us use our challenges. And now we get one where she has said one time yes and one time no. And there's just no question about it that if we had another challenge, we would use it on this lady because as the Court can see she is very weak and indecisive about the question. And I ask the Court, because the Court has not followed this case, throughout the case, that you let us have another challenge in this case, in particular, on this woman and we can give you the ones on Ruiz, uh, Coker, uh, Arlean Walker, Annie Mae Bush, uh, Lassabe, Price and, uh, who were very unequivocal, that they would not under any circumstances, would not vote to impose the Death penalty.
>
> BY THE COURT: Well, I think that's right, I made you use about five of them that didn't equivocate. Uh, I never had no idea that we'd run into this many.

> BY MR. NECAISE: I didn't either, Judge.
>
> [Emphasis added] Tr. Vol. IV, p 545-47, App. 22-23.

It is clear that the trial judge was attempting to insulate the trial against Witherspoon error by forcing the state to use their peremptory challenges instead of challenges for cause.

If we are going to rely on the rulings of the trial court, as petitioner urges, we must do just that and not cite to the interpretation given to those rulings by a reviewing court. Petitioner's argument attempts just such a slight of hand.

With this in mind respondent's contend that the Mississippi Supreme Court, while ultimately reaching the correct result, misapplied this Court's ruling in Wainwright v. Witt, 469 U.S. ___ , 105 S. Ct. 844, 83 L.Ed.2d 841 (1985), by refusing to pay the deference due the trial court's finding that

juror Bounds was not qualified to sit as a juror. This Court stated in Witt:

> We therefore take this opportunity to clarify our decision in Witherspoon, and reaffirm the above-quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. The standard is whether the Juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath."[5] We note that, in addition to dispensing with Witherspoon's reference to "automatic" decision making this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and answer sessions which obtain results in the matter of a catechism. What common sense should have realized experience has proved: Many venireman simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these venireman may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.[6] Despite the lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to apply the law. For

> reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.
>
> [Emphasis added] 83 L.Ed.2d at 851-53.

No deference was paid to the findings of the trial judge who saw and heard this juror. This court has held that this deference should be granted even on direct review. Reynolds v. United States, 98 U.S. 145 (1878). The trial court held, after hearing the juror being questioned by the State and questioning her himself, that:

> BY THE COURT: (Interposing) I should have questioned them on this, I guess . . . but I never had no idea it was going to . . . wind up in a mess like this. I'd hate to get a conviction and get it reversed because of this one woman. She can't make up her mind.
>
> Well, let the record show that the Court is of the firm opinion that there was at least five, even though I think there's around nine challenges been used by the District Attorney for cause, either eight or nine, all right there was eight of them that had said that they were against Capital Punishment.

And I think there was, uh, five of those that were unequivocally opposed to it and answered, in substance, if not even stronger language than the question set forth in the Witherspoon case, uh, from the United States Supreme Court, uh, that I should, at this point allow him to challenge this lady for cause. She is totally indecisive. I think she is totally indecisive. She says one thing one time and one thing another.

The Court is of the opinion that it cheated the State by making him, uh, use, uh by making the District Attorney use his peremptory challenges in at least five instances. And I'm going to allow it in this particular case.

BY MR. STEGALL: Excuse her for cause?

BY THE COURT: I'm going to excuse her.

BY MR. STEGALL: Let me ask the Court this, is the Court of the opinion that, uh, that there has been a sufficient record. . .

BY THE COURT: (Interposing) I'm not going to add any to his challenges.

BY MR. STEGALL: Okay. All right. [sic]

BY THE COURT: I'm not going to go back and give him five more. I'm going to excuse her for cause.
[Emphasis added] Tr. Vol. IV, p. 553-55; App. 25-26.

If the reason the trial court was not allowing peremptory strikes against jurors expressing scruples against the death penalty was that he did not believe they were sincere, then why did he hold that he had "cheated" the State by making it use its peremptory challenges. Further it is clear from the above quoted passage that the trial court was using the word cause when he meant to be using the word peremptory in reference to challenges used by the State. We submit that this is what happened a few lines later in the transcript when he stated that he was going to excuse Juror Bounds for cause.

Contrary to the assertions of petitioner, the record in this case clearly shows that the trial court forced the State to use peremptory challenges against at least five jurors who unequivocally stated that they could not or would not impose the death sentence under any circumstance. The trial court admits this in

his ruling when he stated that he "cheated" the state. App. at 26. Even under a strict interpretation of the ruling in Witherspoon v. Illinois, 391 U.S. 510 (1968), each of these five jurors met the standards to be excused for cause by the State. Juror Ruiz stated that he could not vote to impose the death penalty in this case or any other regardless of what the law was. When the State moved to strike Ruiz for cause the trial court overruled the motion. The State had to use a peremptory challenge in order to remove Ruiz from the jury. The State took exception to this ruling. App. at 3-4. Next Juror Coker stated flatly that she did not believe in the death penalty and would not vote for the death penalty in any case. When the state moved to strike Mrs. Coker for cause the trial court stated, "I'll require you to use one of your challenges." App. 5-6. Juror Bush stated that she would not vote for a death sentence under

any circumstance because she did not believe in the death penalty. The State moved to strike her for cause "because of her conscientious scruples against Capital Punishment." The trial court overruled the motion and excused her using a State peremptory challenge, App. 6-9. Prospective juror Mary Price stated that she did not believe in the death penalty and did not think it should be imposed in any type of case. She stated further that she "could not take it upon [her]self to vote the Death Penalty for anybody." The State asked that she be excused for cause. The trial court refused. App. 10-12. Juror Walker stated that she did not have any objection to the death penalty, but that she could not vote for it. She stated that it would be alright for some one else to vote to impose such a sentence but that she never could no matter what the evidence or the type of case. Again the State moved to strike this juror for cause. The

trial court stated, "I'll overrule you again and let you use your peremptory." The State then excepted stating, "Judge, let me ask that the record state that in all of these I am taking exception to the court's ruling." App. 12-13. There were three other jurors that claimed conscientious scruples against the death penalty. Clearly Juror Pannell was using her supposed opposition as an excuse to get out of jury duty. App. 15-16. Jurors Easton and Lassabe were clear cases of equivocation by the jurors. App. 4-5, 13-15.

Finally we come to Mrs. Bounds. Mrs. Bounds was found by the trial court to be a juror who "can't make up her mind" and as being "totally indecisive." This ruling of the trial court was not given the deference that it was due by the court below. Here we have just the situation that Witt, spoke of, "[d]ispite the lack of clarity in the printed record" it is clear that the trial judge was left with the

definite impression that Juror Bounds" would be unable to faithfully and impartially apply the law." 83 L.Ed.2d at 852. Juror Bounds was properly excused under Witt. The decision in Darden v. Wainwright, _____ U.S. _____, 54 U.S.L.W. 4734, 4736-37 (June 23, 1986), fully supports this position.

B. THE APPLICATION OF A HARMLESS ERROR STANDARD TO THE EXCUSAL OF THE JURORS IN CAPITAL CASES IS NOT IMPROPER.

Even if we assume the Mississippi Supreme Court has not misapplied the ruling in Witt, by not giving due deference to the findings of the trial court, the result it reached and the basis of the decision is correct. As the court below held in its opinion:

> Although the route taken to Mrs. Bounds' dismissal was a circuitous one indeed, and most highly disfavored, it should be obvious to all that no prejudice occurred to the defendant Gray. The force and effect of the trial court's ruling was to correct an error he had committed in refusing to dismiss other jurors for cause after

they had unequivocably stated that they could not vote to impose the death penalty in any circumstance. Certainly the state is entitled to a jury that can follow the instructions and juror's oath. Adams, supra; Witt, supra. That being the case the trial court was correct when it recognized the error in its prior rulings and took affirmative action to correct that error. We have recognized in numerous cases that a trial court should be afforded the opportunity to correct any errors at trial by way of a motion for new trial. House v. State, 445 So.2d 815, 819 (Miss.1984); Read v. State, 430 So.2d 832, 838 (Miss. 1983); Johnson v. State, 404 so.2d 553, 556 (Miss. 1981); Tribbett v.State, 394 So.2d 878, 880-81 (Miss. 1981).

> There is no logical reason not to allow the trial court in this situation to correct its erroneous ruling prior to the empanelling of the jury and termination of trial. Notions of judicial economy make it clear that the trial court should be allowed to recognize and correct its error early in the proceedings, especially where as here, there could have been no possible prejudice to the defendant. That being the case, we find no merit to Gray's final assignment of error.

[Emphasis added] 472 So.2d at 422-23.

What the Mississippi Supreme Court conducted was in effect a harmless error analysis of the situation presented here. The

case at bar is factually different than that presented in Davis v. Georgia, 429 U.S. 122 (1976) and probably falls into the category of cases left open in Adams v. Texas, 448 U. S. 38, 45, n. 3 (1980). Petitioner citing Moore v. Estelle, 670 F. 2d 56 (5th Cir. 1982) and Grijalva v. State, 614 S.W.2d 420 (Tex Cr. App. 1981), attempts to cast this case in the the mold of the cases where the State had peremptory challenges left at the conclusion of voir dire and attempted to use them in an ex post facto fashion on appeal to cure challenges for cause found to be erroneous. This is not a case where the State is attempting to exercise peremptory challenges on appeal that it did not use at trial. The State did not "save a few challenges to be exercised after everyone has gone home" Here the State was forced to exhaust its challenges. In doing so it was forced to useits peremptory challenges on five jurors clearly excludable under whatever standard of

exclusion one wishes to impose upon this case, Witherspoon, Adams or Witt. The trial court recognized its error and corrected this by changing its ruling on an earlier strike and allowing the State to challenge the "totally indecisive" juror. This was done "in a give and take fashion with the defense" at trial and not later at the appellant level. It was totally proper in this case to use a harmless error analysis of the facts leading to the excusal of Juror Bounds.

Mississippi has long used a harmless error approach to matters involving jury selection. While the jury selection process in Mississippi is governed by Miss. Code Ann. §§ 13-5-1 to 13-5-95 (1972), the court below has held that failure to follow statutory procedures was not reversible per se. Harris v. State, 125 So. 253 (Miss. 1929); See also Fuller v. State,468 So.2d 68 (Miss. 1985); Peters v. State, 314 So.2d 724 (Miss. 1975); Sullivan v. State, 155

Miss. 629, 125 115 So. 115 (1929). This harmless error or no-prejudice standard has also been applied to cases dealing with claimed prejudice on the part of a juror, cases in which an excusal or failure to excuse for cause was rendered harmless because peremptory challenges remained, and even cases involving jury selection in death penalty cases. See: Cabello v. State, 471 So.2d 332 (Miss.1985); Billiot v. State, 454 So.2d 445 (Miss. 1984), cert. den. ___ U.S. ___, 84 L.Ed.2d 369, reh. den. 85 L.Ed.2d 154 (1985); Pruett v. State, 431 So.2d 1101 (Miss.1983), cert den. 464 U.s. 865 (Miss. 1984); Gilliard v. State, 428 So.2d 576(Miss. 1983); Ramseur v. State, 368 So.2d 842 (Miss. 1979); Johnson v.State, 340 So.2d 738 (Miss. 1976) Capler v. City of Greenville, 207 So.2d339 (Miss. 1968), cert. den. 392 U.S. 941 (1969); Allegrezza v. State, 240Miss. 382, 120 So.2d 780 (Miss. 1960); Seals v. State, 208 Miss. 236, 44So.2d 61 (1950); Sullivan v.

State, 155 Miss. 629, 125 So. 115 (1929). We would point out that the only one of these cases touching upon Witherspoon error was Pruett. It involved a juror being left on the jury after stating he was opposed to the death penalty and then voting for a death sentence. A harmless error analysis was used by the court below in the decision of this case.

Finally there is only the ruling in Davis to support the position that the erroneous exclusion of a juror in the context of death qualification is not susceptible to a harmless error analysis. This question should not be subjected to a per se rule.

This Court has most recently spoken on the question of the applicability of the harmless error rule to constitutional errors in Rose v. Clark, ___ U.S.___, 46 CCH S.Ct Bull. P. B4382 (July 2, 1986). In Rose v. Clark, Justice Powell writing for the majority reaffimed the

validity of Chapman v. California, 386 U. S. 18 (1967), stating:

> We have emphasized, however, that while there are some errors to which Chapman does not apply, they are the exception and not the rule. United States v. Hasting, 461 U.S. at 509. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Delaware v. Van Arsdall, 475 U.S., at ____; United States v. Hasting, supra at 508-509.
>
> 46 CCH S.Ct. Bull. at B4391.

We would summit that Witherspoon error is not one of those exceptions spoken of in Rose v. Clark. In Delaware v. Van Arsdall, 475 U.S.__,

89 L.Ed.2d 674, 106 S.Ct. ____ (1986), the Court, through Justice Rhenquist stated:

> Since Chapman, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. E.g., United States v. Hasting, supra (improper comment on defendant's silence at trial); Moore v.Illinois, 434 U.s. 220, 232 (1977) (admission of identification obtained in violation of right to counsel); Harrington v. California, supra (admission of nontestifying codefendant's statement). The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, United States v. Nobles, 422 U.S. 225, 230 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R.Traynor, The Riddle of Harmless Error 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.")

89 L.Ed.2d at 684-685.

The Court in Rose v. Clark, clearly set forth the type errors that could never be harmless error and reversal would be required without regard to the evidence. These were cases in which the errors "aborted the basic trial process, . . . or denied it altogether." 46 CCH S.Ct. Bull. at B4390, n.9. The examples cited by the Court in Rose v. Clark were the errors found in the following cases Payne v. Arkansas, 356 U.S. 560 (1958) (introduction of a coerced confession); Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (adjudication by biased judge); Vasquez v. Hillery, 474 U.S. ___, 106 S.Ct.617, 88 L.Ed.2d 598 (1986) (systematic exclusion of blacks from grand jury); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (directed verdict of conviction in criminal case). While the petitioner claimed in the court below that death scrupled jurors were being systematically

excluded from the jury, the exclusion of Juror Bounds did not violate any cross section standards as Witherspoon excludables do not constitute a distinctive group. Lockhart v. McCree, 476 U.S. ___, 106 S.Ct.1758, 90 L.Ed.2d 137 (1986). There being no recognized distinctive group this is not a case for the application of Batson v. Kentucky, 476 U.S. __, 90 L.Ed.2d 69, 106 S.Ct. ____ (1986). Here there was no abortion of the basic trial process, nor was there a denial of a basic trial altogether. What we have here is the simple question of whether or not a trial judge is allowed to correct an error he made in the selection of a capital jury. It would be ludicrous to hold that errors such as those here could never be subjected to a harmless error standard. At trial petitioner was represented by counsel, he was allowed to present evidence and arguments before an impartial judge and jury, therefore a harmless

error analysis is called for in this case. Rose v. Clark. We must remember that petitioner has never made the claim that the jury that tried, convicted and sentenced him was impartial. All petitioner claimed, below and here, is that there has been a technical violation of Witherspoon, in the exclusion of a juror he claims she stated she could vote for the death penalty. He would have this Court reach the result he wishes in the "manner of a catechism." 83L.Ed.2d at 852.

In United States v. Hastings, 461 U.S. 499 (1983), the Court reviewed its holding in Chapman. Chief Justice Burger, writing for the Court, stated:

> In holding that the harmless-error rule governs even constitutional violations under some circumstances, the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error free, perfect trial, and that the Constitution does not guarantee such a trial. [citations

omitted] Chapman reflected the concern noted by Chief Justice Roger Traynor of the Supreme Court of California, that when courts fashion rules whose violations mandate automatic reversals, they" retrea[t] from their responsibility, becoming instead' impregnable citadels of technicality.'" R. Traynor , The Riddle of Harmless Error 14 (1970) (quoting Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 ABAJ 217, 222 (1925)).

Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations, [citations omitted]. The goal, as Chief Justice Traynor has noted, is "to conserve judicial resources by enabling the judicial process of prejudicial error without becoming mired in harmless error." Traynor, supra at 81.

[Emphasis added, citations and footnotes omitted] 461 U.S. at 508-09.

In Davis v. Georgia, 429 U.S. 122 (1976), this Court, per curiam, reversed the death sentence imposed on Curfew Davis by the State of Georgia. The Court held:

> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings" (391 U.S.,at 522 n. 21, 20 L.Ed.2776, 88 S.Ct. 1770, 46 Ohio Ops 2d 368), he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.
>
> 50 L.Ed.2d at 341.

The majority did not hold that Witherspoon error was never susceptible to a harmless analysis. The mention of a per se rule and the failure to apply the harmless error test comes in the dissent from this summary disposal of the case. It is further interesting to note that the idea of a harmless error standard being applied to questions of juror qualification in death cases has recently been revived by Justice Stevens in his concurrence in Wainwright v. Witt, 83 L.Ed.2d 841 (1985). The approach he advocated to dispose of the

questions raised there concerning juror excusal was a harmless error approach. He stated:

> Given the gruesome facts of this case, see ante, at ____ U.S.____, 83 L.Ed.2d 845-846, and Colby's somewhat timorous responses, it is entirely possible that her appearance and demeanor persuaded trial counsel that he would prefer a more vigorous or less reluctant juror.[5] In view of that possibility, I am unable to conclude that the State's failure to make the kind of record required by Adams v. Texas constitutes an error so fundamental that it infects the validity of the death sentence in this case.
>
> [Emphasis added, footnote omitted]

83 L.Ed.2d at 860.

This is the type standard that should be applied in the case at bar and in cases of claimed errors in jury selection in death penalty cases. If this Court continues to read Davis, as creating a per se rule it stands guilty of "retrea[ting] from [its] responsibility, becoming instead [an] 'impregnable citadel[] of technicality.'" The

course already been condemned in Hastings. 461 U.S. at 509.

Petitioner is wrong when he says that the determination of whether to impose the death sentence is a "moral one" alone. Barclay v. Florida, 463 U.S. 939 (1983), cited by petitioner, clearly states that it is a"moral, factual and legal" determination. What petitioner is arguing is that he is entitled to have persons on his jury opposed to the death penalty, a issue that was laid to rest in Lockhart v. McCree. All petitioner is entitled to is an impartial jury. The Court held in Lockhart:

> We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial jury consist of nothing more than "jurors who will conscientiously apply the law and find the facts."
>
> [Emphasis Added] 90 L.Ed.2d at 151

Again Petitioner does not claim that the jury that convicted him and sentenced him to death

was impartial. His only claim is that one juror was excused after giving equivocal answers to questions concerning her beliefs about the death penalty. The trial court allowed this excusal by reconsidering an earlier ruling requiring the State to use peremptory challenges on jurors that were clearly excludable for cause under Witherspoon. This case cries out for the application of a harmless error analysis.

CONCLUSION

For the above and foregoing reasons the decision of the Mississippi Supreme Court, holding the error here, if error at all, was harmless, should be affirmed.

Respectfully submitted,

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CERTIFICATE

I, Marvin L. White, Jr., an Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing **BRIEF FOR THE RESPONDENT** to the following:

This, the 14th day of July, 1986.

MARVIN L. WHITE, JR.

FILED
NOV. 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID RANDOLPH GRAY,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ Of Certiorari
To The Mississippi Supreme Court

REPLY BRIEF FOR PETITIONER

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I. ARGUMENT

A. THE TRIAL COURT ERRED IN EXCUSING JUROR BOUNDS FOR CAUSE BECAUSE, AS FOUND BY THE MISSISSIPPI SUPREME COURT, THE JUROR COULD HAVE ACTED IMPARTIALLY IN DETERMINING SENTENCE AND, THUS, WAS QUALIFIED UNDER WITT AND ADAMS.

The Respondent has argued that the harmless error issue before the Court should not be reached because the trial court's decision to excuse the questioned juror, Mrs. Bounds, was not error. Adoption of this alternative ground renders the Mississippi Supreme Court's avoidance of *Davis* v. *Georgia*, 429 U.S.122, 97 S.Ct. 399, 450 L.Ed.2d 339 (1976), superfluous. Analysis of the questioning of Mrs. Bounds and of the Mississippi Supreme Court's application of *Wainwright* v. *Witt*, 469 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), reveals that the excusal for cause of Mrs. Bounds was error.

The questioning of prospective jurors prior to Mrs. Bounds was convoluted and confusing. (Se, e.g., J.A. 5 and 10.) The questioning of Mrs. Bounds continued this trend. Mrs. Bounds' responses reflected her confusion. At times, she gave responses that qualified her as a juror. At other times, her responses were more equivocal.

Fortunately, the trial court, through its running commentary, has provided this Court with an assessment of Mrs. Bounds' ability to be seated as a juror. The trial judge's comments reveal that Mrs. Bounds was improperly excused for cause.

At the outset, the prosecutor questioned Mrs. Bounds in his search "to find twelve people who tells (sic) [him] that they have no conscientious scruples against Capital Punishment when imposed by law." (J.A. 16). While this

search may have suited the prosecutor's purpose, it was not consistent with the parameters set out in *Witt*.

Witt does not require the exclusion of all prospective jurors who have conscientious scruples against the death penalty. A juror may only be excluded if he maintains principles that would "prevent or substantially impair the performance of his duties as . . . a juror in accordance with his instructions and oath." *Witt*, 105 S.Ct. at 852. A scrupled juror may agree to set aside his or her scruples in deference to the law. He would then be qualified to sit as a juror.

The trial court interceded and asked Mrs. Bounds, "Would you automatically vote against the imposition of the Death Penalty without regard to any evidence that might be developed in the trial in this case?" Mrs. Bounds responded appropriately, "I would try to listen to the case." (J.A. 17).

Mrs. Bounds was directed to respond, yes or no. She responded appropriately again, "No, sir." (J.A. 17).

The prosecutor was allowed to question Mrs. Bounds again. This time she equivocated and did not think she could impose the death penalty. The prosecution then moved to strike Mrs. Bounds for cause. (J.A. 19-20).

In response, the trial judge stated his assessment of Mrs. Bounds' ability to be seated as a juror. The trial judge here stated, "Well, I don't know whether she could or couldn't [impose the death penalty]. She told me she could, a while ago." (J.A. 20).

It is clear, to this point, that the prosecutor, the party that requested Mrs. Bounds' excusal, had not carried its burden. See, *Witt*, 105 S.Ct. at 852 ("As with any other trial situation where an adversary wishes to exclude a

juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. See *Reynolds* v. *United States*, 98 U.S. 145, 157, 25 L.Ed. 244 (1879).". The remainder of Mrs. Bounds' questioning did not provide a proper basis for her excusal.

The trial judge again took up the questioning of Mrs. Bounds. He began by indicating that her honesty and sincerity were not in question. (J.A. 20). Mrs. Bounds then indicated that she would neither automatically vote for the death penalty (J.A. 21) or automatically vote against it. (J.A. 21-22).

The prosecutor now realized that Mrs. Bounds could not properly be struck for cause and moved the court to reverse its prior rulings (J.A. 23) so that a peremptory challenge would be returned to the State for use against Mrs. Bounds.[1]

The trial court directed the prosecutor to question Mrs. Bounds further. The final set of questions put to Mrs. Bounds follows.

> BY MR. NECAISE: Mrs. Bounds, do you feel like this is a case, and I don't, I certainly don't want you to think that I'm picking on you. But, uh, what we are trying to do here is that we are trying to pick twelve people, uh, who we feel that, uh, would be fair and impartial persons, what we are looking for is people who could be fair and impartial and who could, if the evidence warranted it, could impose the Death Penalty because we feel that this a case that warrants the imposition of the Death Penalty. We know that

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[1] By this point, the prosecutor had used his entire allotment of twelve (12) peremptory challenges. Five peremptory challenges were involved in the prosecutor's request.

the law allows it. And could you tell me, do you feel like you could reach a verdict in this case, either guilty or not guilty in this case?

BY MRS. BOUNDS: Could I reach a verdict?

BY MR. NECAISE: A verdict.

BY MRS. BOUNDS: A verdict?

BY MR. NECAISE: Yes, ma'am.

BY MRS. BOUNDS: Either way?

BY MR. NECAISE: Yes, ma'am.

BY MRS. BOUNDS: Yes.

BY MR. NECAISE: You could reach a verdict of guilty or not guilty. Now, if that verdict was guilty and you felt that from the evidence that you used to find him guilty, that evidence which you had used to find him guilty, if you felt that that evidence was of such a heinous, atrocious and cruel manner, do you feel that you could vote for imposing the Death Penalty on this twenty-eight year old Defendant?

BY MRS. BOUNDS: Yes.

BY MR. NECAISE: Ma'am?

BY MRS. BOUNDS: Yes.

BY MR. NECAISE: Judge, the lady says yes, but we would challenge her for cause.

(J.A. 23-24)

The trial judge then, over objection, excused Mrs. Bounds for cause because she was "indecisive." (J.A. 26).

The prosecution failed to carry its burden of proof. Mrs. Bounds was excused for an improper reason. "[S]he was clearly qualified to be seated as a juror under the *Adams*

and *Witt* criteria." *Gray* v. *Mississippi*, 472 So.2d 409, 422 (Miss. 1985). The trial court's decision constituted error.

B. THE RECORD HERE DOES NOT SUPPORT RESPONDENT'S CONTENTION THAT THE TRIAL COURT WAS INTENT UPON VIOLATING THE LAW BY REFUSING ALL CHALLENGES FOR CAUSE MADE BY THE STATE.

Next, Respondent has argued that the Mississippi Supreme Court has misconstrued the actions and intent of the trial court when the trial court refused to excuse certain jurors for cause. The Mississippi Supreme Court considered the rulings to have been based upon the trial court's assessment of the credibility of the prospective jurors. *Gray*, 472 So.2d at 421. Respondent argues that the trial court was simply intent upon denying all cause challenges made by the State.

In Mississippi, as in other states, trial judges take an oath to uphold the law.[2] The Respondent has asked this Court to presume that the trial judge in this case intentionally violated his oath of office.

In its brief, the Respondent has argued that references by the trial judge to "cheating" the State (Resp. Brief at 18), clearly establish that the trial judge, from the outset, was intent upon violating the law by purposely refusing to excuse any jurors for cause, no matter the clarity of the juror's bias. The record before this Court is simply insufficient to support the Respondent's contention.[3]

At the time of the trial judge's reference to "cheating" the State, the trial court was clearly given the oppor-

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[2] Mississippi Constitution, Article 6, § 155.

[3] Indeed, the trial court granted a challenge for cause made by the State against prospective juror Schleh (T. 504-506).

tunity to reverse its previous rulings if the court felt that the prior rulings were erroneous. The correction could have been accomplished by granting the State's motion to reverse one of the earlier rulings that denied the State's challenges for cause. (J.A. 23). The judge refused to alter his earlier rulings. (J.A. 26). Thus, it cannot be stated with confidence that the judge considered the jurors in question unqualified and nonetheless ignored the law and refused to excuse them for cause.

If a presumption is to be entertained, it must be presumed that the trial court acted in accordance with the law. *Witt*, 105 S.Ct. at 856; *Marshall* v. *Lonberger*, 459 U.S. 422, 103 S.Ct. 843, 850, 74 L.Ed.2d 646 (1983); *LaValle* v. *Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973); and *Townsend* v. *Sain*, 372 U.S. 293 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). This better explains the court's actions and establishes that the court acted consistent with its duty to err, if at all, on the side of the accused.

The trial judge may have cheated the State by deciding questionable issues in the Petitioner's favor. This, however seemingly unfair, was precisely the court's duty. *Witt*, 105 S.Ct. at 855 ("We reiterate what this Court stressed in *Dennis* v. *United States*, 339 U.S. 162, 168, 70 S.Ct. 519, 521, 94 L.Ed. 734 (1950): '[T]he trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor. . . . In exercising its discretion, the trial court must be zealous to protect the rights of an accused.'").

The Mississippi Supreme Court, presumably cognizant of the trial court's oath of office and prior practices, found that the jurors in question were retained because their

attestations were considered insincere by the trial court.[4] On the state of this record, this Court should not disturb that finding.

C. THE AMICI CURIAE HAVE ARGUED THAT THE PROCEDURES APPLICABLE TO THE PRESERVATION OF JURY ERROR IN NON-CAPITAL CASES SHOULD BE APPLIED HERE. THE PREMISE UPON WHICH THE AMICI CURIAE'S ARGUMENT IS BASED IS FALLACIOUS AS THE FACTFINDING AND LIMITED SENTENCING FUNCTIONS OF NON-CAPITAL JURIES ARE VASTLY DIFFERENT FROM THE DISCRETIONARY FUNCTIONING OF A JURY IN A CAPITAL SENTENCING PROCEEDING.

The Amici Curiae have argued that the nature of a jury's role in a capital trial and sentencing proceeding is similar to the role of a jury in a non-capital case. (Amici Curiae, hereafter, A.C., Brief at 4). In non-capital trials, the argument continues, "most states, by statute, court rule, or case decision, require a defendant seeking reversal of his conviction or vacation of his sentence based upon the erroneous grant or denial of a challenge to a venireman to demonstrate some prejudice to the defense by the trial court's erroneous action." (A.C. Brief at 5). As the roles of the capital and non-capital juries are similar, capital defendants should also be required to establish prejudice.

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[4] It is interesting to note that Respondent made this argument before the Mississippi Supreme Court and asked that court to officially condemn the practice of trial courts refusing to grant meritorious cause challenges. (Appellee Brief filed by Respondent before the Mississippi Supreme Court at 15). The Mississippi Supreme Court declined comment on the issue.

Although apparently logical on its face, analysis of the argument put forth by the Amici Curiae reveals that the basic assumptions upon which the argument is based are inaccurate. The vast majority of states that require a showing of prejudice (See, A.C. Brief at 6, fn. 1) do not allow juries to determine felony sentences. See, e.g., *State* v. *McMillian*, 28 N.C. App. 308, 220 SE.2d 825 (1976). Further, in the few states that still have jury sentencing, the proceedings there involved are not the equivalent of capital sentencing.

The factfinding function of a jury in determining guilt is vastly different from the discretionary function involved in determining an appropriate sentence that accurately represents the conscience and morals of the community. See, e.g., *Adams* v. *Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). The treatment of state appeals involving juries that engage solely in factfinding is irrelevant to the instant capital sentencing issue.

The few states that permit juries in non-capital cases to determine sentences, do so under circumstances very different from capital cases. For example, the concept of mercy plays a much more important role in death penalty cases than in non-capital cases. In Mississippi, as in other states, a capital jury is free to impose a sentence of life even if the aggravating factors outweigh the mitigating factors. *Coleman* v. *State*, 378 So.2d 640 (Miss. 1979).

Capital jury sentencing is generally accomplished in a bifurcated proceeding. This is not true in non-capital sentencing. Also the variety of evidence admissible in mitigation is much greater than that generally seen in non-capital cases.

Finally, in the capital sentencing area, a defendant is entitled to have his trial subjected to a greater degree of scrutiny than in non-capital cases. *Turner* v. *Murray*, 476

U.S. ___, 106 S.Ct. 683, 90 L.Ed.2d 77 (1986), Sentences of death must meet an enhanced standard of reliability. *Woodson* v. *North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (Plurality opinion).

Capital sentencing occurs in a special context. Nowhere is it more important that the actuality and appearance of fairness be protected. Conclusions about appropriate procedures in non-capital cases are neither relevant or controlling in capital sentencing and should not be adopted here.

D. CAPITAL SENTENCING OCCURS IN A SPECIAL CONTEXT WHERE A JURY'S DECISION IS A REFLECTION OF A COMMUNITY'S MORALITY AND IS HIGHLY DISCRETIONARY. AS SUCH, AN APPELLATE COURT CANNOT CONFIDENTLY FIND THAT AN ERROR COMMITTED IN THE EXCUSAL OF A JUROR FOR CAUSE WAS HARMLESS BEYOND A REASONABLE DOUBT.

The Respondent here argues that "the exclusion of Juror Bounds did not violate fair cross section standards as *Witherspoon* excludables do no constitute a distinctive group. *Lockhart* v. *McCree*, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986)." (Resp. Brief at 31-32).[5] The Amici

[5] In part, Respondent has also argued that the instant case is distinguishable from *Davis* v. *Georgia* because the Mississippi Supreme Court did not engage in a harmless error analysis. Rather, the Mississippi Supreme Court merely allowed the trial judge to correct his previous error. (Resp. Brief at 23). Had the trial court acted as Respondent argues, Petitioner would probably not have sought certorari on this issue. The trial court had the opportunity to clearly acknowledge that its earlier rulings were erroneous and to reverse those rulings. (J.A. 23). The court refused to do so. (J.A. 26). Rather, it improperly excused Mrs. Bounds for cause. Assuming *arguendo*, that the prior rulings were erroneous, capital sentencing cases are hardly an appropriate vehicle for this Court to adopt the concept of "off-setting penalties" as apparently sought by Respondent.

Curiae have argued similarly. (A.C. Brief at 9-10). Both the Amici Curiae and the Respondent have confused the Court's comments in *Lockhart*.

In *Lockhart* v. *McCree*, this Court continued to recognize the vital distinction between the factfinding role of a capital jury in determining guilt or innocence and the discretionary function involved in capital sentencing. The two functions are separate and distinct and require different analyses.[6] As to factfinding, *Witherspoon* excludables do not form a cognizable group. However, as to sentencing, the improper exclusion of scrupled jurors can lead to a constitutionally cognizable imbalance of views.

Rather than foreclosing Petitioner's arguments, this Court's opinions of last term as well as the continued development of *Witherspoon-Adams-Witt*, argue strongly for Petitioner's position.[7] That is, the rule of *Davis* v. *Georgia*, supra, should be preserved.

Witherspoon,[8] did not create a ground for excluding jurors. Rather, it created a boundary that the states may

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[6] See *Lockhart*, 106 S.Ct. at 1769 ("[B]oth *Witherspoon* and *Adams* dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an 'imbalanced' jury.") and Id., 106 S.Ct. at 1770 ("In the case at bar, by contrast, we deal not with capital sentencing, but with the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant, where jury discretion is more channeled.").

[7] For example, *Rose* v. *Clark*, 54 USLW 5023, 5025 (Decided July 2, 1986) specifically references the factfinding function of a trial and states that harmless error analysis presumably applies to all alleged error if the defendant had counsel and was tried by an impartial adjudicator. *Davis* v. *Georgia*, supra, dealt with errors during the selection of an impartial adjudicator and related to sentencing, not factfinding.

[8] 391 U.S. 510, 88 S.Ct. 1779, 20 L.Ed.2d 776 (1968).

not transgress in their efforts to obtain impartial juries. *Adams* v. *Texas*, 448 U.S. at 48-49, 100 S.Ct. at 2528.

The progression from *Witherspoon* to *Witt* has served to soften the initial dictates of *Witherspoon*. As to sentencing, under *Witherspoon*, only those persons who would automatically vote against the death penalty could properly be excluded. Today, under *Witt*, it is only necessary to show that a juror's beliefs would substantially impair his performance.

The impact of *Witt* is to make more jurors subject to exclusion. Conversely, applying *Witt*, fewer errors are likely to occur. The errors that do result, however, are likely to be more egregious. The reason for this is twofold.

First, because the *Witt* standard is easier to apply and allows for broader exclusions, a trial judge is given much greater latitude before his error is recognized. The transgression must be greater than that recognized under *Witherspoon*.

Second, with the broader exclusions permissible under *Witt*, fewer attitudes and beliefs are actually represented on a particular jury. No longer are merely the outer most fringes excluded. Now, juries are apt to be more homogeneous and, as a consequence, less representative of the full spectrum of community attitudes. This detracts from the quality of deliberations and undercuts the ability of a particular jury to represent the conscience of the community from which it was drawn.[9]

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[9] See, *Ballew* v. *Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978) and Cowan, Thompson and Ellsworth, The Effect of Death Qualification on Juror's Predisposition to Convict and on the Quality of Deliberation, 8 Law and Human Behavior 53-79 (1984).

In *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) this Court recognized that trials need not be perfect. Constitutional errors may occur and may be proven harmless beyond a reasonable doubt. Convictions entered after trials that contained harmless errors may stand.

This Court, as recently as last term, recognized that in determining the propriety of a sentence of death, a jury exercises a unique, individualized discretionary function. *Turner* v. *Murray*, supra. See also, *Caldwell* v. *Mississippi*, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This function is not readily subject to harmless error review.

The Respondent and Amici Curiae have argued that the error in excusing Mrs. Bounds for cause was harmless. However, nothing in either the Respondent's brief or in the brief submitted by the Amici Curiae establishes that the error did not affect jury deliberations, the appearance of fairness or the actual outcome. If such arguments had been proposed, discussion could then move to the question of whether the error was harmless beyond a reasonable doubt.

The nature of the jury's sentencing decision precludes discussion of the impact of errors. Individualized, highly discretionary jury sentencing decisions are, almost by definition, insulated from the meticulous analysis required to determine that constitutional errors are harmless.

The per se rule announced in *Davis* v. *Georgia* is consistent with the capital sentencing jurisprudence that has developed since 1976. *Davis* v. *Georgia* should be preserved.

II. CONCLUSION

For the foregoing reasons, this Court should remand the instant matter for a new sentencing proceeding.

Respectfully submitted,

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No. 85-5454

In The

Supreme Court of the United States

October Term 1986

DAVID RANDOLPH GRAY,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER BY THE NORTH CAROLINA ATTORNEY GENERAL AND THE 12 AMICI THAT APPEAR ON THE INSIDE COVER

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QUESTION PRESENTED FOR REVIEW

MAY THE ERRONEOUS EXCLUSION OF A JUROR FROM THE PANEL IN A CAPITAL MURDER TRIAL ON THE BASIS OF *WITHERSPOON v. ILLINOIS* BE HARMLESS ERROR?

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No. 85-545

In The

Supreme Court of the United States

October Term 1986

DAVID RANDOLPH GRAY,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

BRIEF AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The ***amici curiae*** here consist of States, each of which maintain capital punishment for certain murders. The States, by statute or case decision, utilize jury selection procedures allowing the exclusion of veniremen consistent with this Court's decisions in ***Wainwright v. Witt***, __ U.S. __ , 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), ***Adams v. Texas***, 440 U.S. 33 (1980), and ***Witherspoon v. Illinois***, 391 U.S. 510 (1968).

Petitioner in this matter asserts that the Mississippi trial court violated his right to a jury that was fair and impartial, based upon the Sixth Amendment guarantee, when the trial judge excused a venireman plainly qualified to serve on a capital jury, based upon ***Witherspoon v. Illinois, supra***. The Defendant completed jury selection with peremptory challenges remaining. The State exhausted its peremptory challenges due to the trial judge's erroneous refusal, earlier in jury selection, to exclude some jurors on ***Witherspoon*** grounds. The State utilized peremptory challenges to remove these jurors following denial of the challenge for cause. The Supreme Court of Mississippi held the erroneous exclusion constituted harmless error. Petitioner asserts on the authority of ***Davis v. Georgia***, 429 U.S. 122 (1976), that such error may never be harmless. The States, by statute or case decision, recognize the harmless error doctrine in other contexts, and discern no reason harmless error should not apply in a capital case jury selection proceeding involving ***Witherspoon*** issues.

STATEMENT OF THE CASE

The States adopt the Statement of the Case as set forth by the respondent State of Mississippi.

SUMMARY OF THE ARGUMENT

The States recognize the special position which a capital jury occupies in most state capital punishment procedures, and the particularly close scrutiny capital trials must withstand. However, the States also believe that the fact that a defendant has been sentenced to death does not preclude a reviewing court from employing the harmless error rule in determining the effect of a ***Witherspoon*** error in jury selection.

The majority of the States require a defendant in a noncapital felony trial to prove actual prejudice by the improper exclusion or inclusion of a venireman. These States thus apply the harmless error doctrine in appropriate instances.

This court has applied the harmless error doctrine to most constitutional errors in felony proceedings including proceedings in which the defendant has received the death penalty. The nature of ***Witherspoon*** error and the applicable constitutional provisions fall within the harmless error guidelines applied by this Court in other cases. The States urge this Court to recognize the harmless error doctrine in dealing with ***Witherspoon*** error, and specifically urge this Court to reject the per se reversible error approach to ***Witherspoon*** excludables suggested by the ***per curiam*** opinion in ***Davis v. Georgia***, 429 U.S. 122 (1976).

ARGUMENT

THE MAJORITY OF STATES REQUIRE A DEFENDANT TO SHOW PREJUDICE RESULTED FROM THE TRIAL COURT'S ERRONEOUS GRANT OR DENIAL OF A CHALLENGE FOR CAUSE MADE IN THE COURSE OF A FELONY JURY TRIAL. NEITHER THE CONSTITUTION NOR THE SPECIAL DUTIES AND RESPONSIBILITIES OF A CAPITAL JURY JUSTIFIES THE REJECTION OF THE HARMLESS ERROR DOCTRINE IN *WITHERSPOON* ISSUES.

The States recognize the position which a capital jury occupies in most state capital punishment procedures. The States further recognize the particular sensitivity required of both the trial and appellate bench to discern and avoid possible juror bias or prejudice. ***Turner v. Murray***, 476 U.S. __ , 106 S.Ct. 1683, 90 L.Ed.2d 27, 30, 1986). The qualitative difference of death from all other punishments requires a correspondingly greater scrutiny of the capital sentencing determination for circumstances which create an unacceptable risk that the jurors mistakenly or arbitrarily imposed a death penalty. ***Turner v. Murray***, 90 L.Ed.2d at 36. However, nothing in the nature of the jury role in capital trial and sentencing proceedings nor in the United States Constitution itself dictates that a court must hold automatically prejudicial ***Witherspoon*** error in the jury selection proceeding. In a capital case, as in a non capital case, the ultimate concern is that the jury which tries the defendant be impartial. The application of the harmless

error doctrine to ***Witherspoon*** error by a reviewing court does not in any way jeopardize that goal.

Numerous State courts have considered the improper grant or denial of a challenge for cause as reversible or harmless error. Most States, by statute, court rule, or case decision, require a defendant seeking reversal of his conviction or vacation of his sentence based upon the erroneous grant or denial of a challenge to a venireman to demonstrate some prejudice to the defense by the trial court's erroneous action. Proof of prejudice may require the exhaustion of all peremptory challenges before completion of jury selection or, in addition to exhaustion of all challenges, may require the attempted challenge of an additional juror following exhaustion of all peremptory challenges and the denial of a challenge for cause.

For example, The North Carolina Criminal Procedure Act sets forth, with specificity, the steps necessary to preserve for appellate review error in the denial of a defendant's challenge for cause. N.C.G.S. 15A-1214(h) (1983) requires that the defendant exhaust all the peremptory challenges available to him, renew a challenge for cause previously denied, and allow the trial court to again deny the challenge. Interestingly, the North Carolina practice allows the trial judge to grant additional peremptory challenges to any party who the trial court determines suffered wrongful denial of a challenge for cause and utilized a peremptory challenge in lieu thereof. See N.C.G.S. 15A-1214(i) (1983). Case law imposes similar requirements upon a defendant asserting error in the trial court's grant of a state's challenge for cause. See ***State v. Potts***, 100 N.C. 457, 6 S.E. 657 (1888).

As an additional example, the New York Criminal Practice Law (CPL § 270.20) codifies the requirements a defendant must meet to assert on appeal prejudicial error for the erroneous grant or denial of a challenge for cause. In the case of the erroneous grant of a State's challenge for cause, the statute requires a showing that the State exhausted all peremptory challenges at the time or exhausted such challenges before completion of jury selection. The erroneous denial of a defense challenge for cause constitutes reversible error only when the defendant exhausted his peremptory challenges prior to the denied challenge for cause, or the defendant peremptorily challenged the juror and exhausted his peremptory challenges prior to completion of jury selection. See ***People v. Culhane***, 33 N.Y.2d 90, 350 N.Y. Supp. 2d 381, 305 N.E.2d 469, 71 ALR 3d 956 (1973), and ***People v. Murphy***, 99 A.D.2d 613, 472 N.Y. Supp. 2d 202 (1984). Absent compliance with the statute, error in the grant or denial of a challenge for cause stands harmless.

Cases from other jurisdictions also require exhaustion of peremptory challenges as proof of prejudice.[1] Some jurisdictions

[1] ***Jenkins v. State of Florida***, 380 So. 2d 1042 (Fla. App., 1980), ***review denied*** 389 So.2d 111; ***Finney v. State***, 242 Ga. 582, 250 S.E. 2d 388 (1978) ***cert. denied*** 441 U.S. 916 (1979); ***State v. Mitchell***, 104 Id. 493, 660 P.2d 1336, ***cert. denied*** 461 U.S. 934 (1983); ***Foresta v. State***, 274 Ind. 658, 413 N.E. 2d 889 (1980); ***State v. Sagebiel***, 206 Kan. 482, 480 P.2d 44 (1971); ***State v. Smith***, 430 So. 2d 31 (La. 1983); ***State v. Pellatier***, 434 A.2d 52 (Me. 1981); ***Com. v. Susi***, 394 Mass. 784, 477 N.E.2d 995 (1985); ***People v. Rush***, 113 Mich. 539, 71 N.W. 863 (1897); ***Kennison v. State***, 83 Neb. 391, 119 N.W. 768 (1909); ***State v. Fouquette***, 67 Nev. 505, 221 P.2d 404 (1950); ***State v. Smith***, 92 N.M. 533, 591 P.2d 664 (1979); ***State v O'Connor***, 58 N.D. 554, 226 N.W. 601 (1929); ***Hartnett v. State***, 42 O.S. 568 (1884); ***AKE v State***, 663 P.2d 1 (Okla. 1983) ***on rev.*** 465 U.S. 1099, 105 S.Ct. 1087, 84 L.Ed.2d 53 (NO. 83-5424 dec. February 26, 1985); ***State v. Humphrey***, 63 Or. 540, 128 P. 824 (1912); ***Com. v. Johnson***, 299 Pa. Super. 172, 445 A.2d 509 (1982); ***State v. Flack***, 77 S.D. 176, 89 N.W. 2d 30 (1958); ***Hammett v. State***, 578 S.W. 2d 699 (Tex.

continued

require exhaustion of all peremptory challenges and the attempted exercise of an additional peremptory challenge following denial of a challenge for cause. In essence, these jurisdictions require the defendant to accept an unqualified or unwanted juror for a showing of prejudice.[2] A few jurisdictions reject the harmless error approach and hold as prejudicial any improper grant or denial of a challenge for cause.[3] Finally, some cases consider the rejection of a qualified juror harmless error absent some showing that the jury, as constituted, was not fair and impartial.[4]

Thus, the majority of the states require some showing of prejudice in the erroneous grant or denial of a challenge for cause prior to awarding a complaining defendant a new trial. Relatively few jurisdictions adopt a per se error rule. There is no constitutional reason to alter these traditional rules requiring a showing of prejudice simply because the improper challenge involved a ***Witherspoon*** violation as opposed to a challenge based on some other ground.

continued from above

Cr. App. 1979) pet. dis. 448 U.S. 725; ***State v. Hewitt***, 689 P.2d 22 (Utah, 1984); ***Masterson v. State***, 139 Vt. 106, 423 A.2d 845 (1980).

[2] ***People v. Washington***, 104 Ill.App. 3d 386, 432 N.E.2d 1020 (1982); ***State v. Cody***, 446 So.2d 1278 (App. 2d Cir., 1984); ***State v. Adcock***, 310 N.C. 1, 310 S.E.2d 587 (1983).

[3] ***State v. McGrew***, 534 S.W. 2d 549 (Mo. App., 1976) and ***State v. Daniels***, 629 S.W. 2d 627 (Mo. App., 1982); ***Breeden v. The Com.***, 217 Va. 297, 227 S.E.2d 734 (1976); ***State v. West***, 157 W.Va. 209, 200 S.E.2d 859 (1973).

[4] ***State v. Kendall***,200 Iowa 483, 203 N.W. 806 (1925); ***Gall v. Com.***, 607 S.W.2d 97 (Ky, 1980), ***ovrd on other grounds Payne v. Com***, 623 S.W.2d 867 (Ky.1981); ***State v. Kluseman***, 53 Minn 541, 55 N.W. 741 (1893); ***State v. Austad***, 197 Mon.70, 641 P.2d 1373 (1982); and ***State v. Sinclair***, 57 N.J. 56, 269 A.2d 161 (1970).

In ***Witherspoon v. Illinois***, 391 U.S. 510 (1968), this Court held constitutionally impermissible the removal from the venire of all persons who expressed conscientious scruples in opposition to capital punishment. Justice Stewart wrote that such a jury, swept of all who expressed reservations concerning the imposition of a death sentence, fell short of the Sixth Amendment requirement of a fair and impartial jury in its role as an arbiter of the punishment to be imposed. ***Witherspoon v. Illinois***, 391 U.S. at 518. Justice Stewart noted that a capital jury expresses the conscience of the community on the ultimate question of life or death, a capital defendant stands constitutionally entitled to a jury chosen from a venire reflecting the community views on sentencing issues.

However, nothing in Justice Stewart's opinion suggests a per se error rule is applicable to the improper exclusion of a single venireman, as opposed to a distinctive group, on ***Witherspoon*** grounds. Subsequently, in ***Davis v. Georgia***, 429 U.S. 122 (1976), this Court, ***per curiam***, reversed a death sentence based upon the improper ***Witherspoon*** exclusion of a single venireman. In dissent, Justice Rehnquist (joined by Chief Justice Burger and Justice Blackmun) observed that "[i]t is, moreover, unclear whether the State was entitled to another peremptory challenge, and surely [***Witherspoon v. Illinois***, 391 U.S. 510 (1968)] does not decide whether the presence of unexercised peremptory challenges might render harmless the improper exclusion of a limited number of veniremen." ***Davis v. Georgia, Illinois***, 429 U.S. at 124. Therefore, ***Davis v. Georgia, supra***, did not invalidate in the ***Witherspoon*** context, the rule of the majority of the States that requires exhaustion of all peremptory challenges in order to show prejudice from the improper exclusion of a venireman, and left

open the question whether such an improper exclusion ever may constitute harmless error.

Moreover, nothing about the improper exclusion of a venireman on the basis of ***Witherspoon*** requires a rule of per se reversible error. In ***Lockhart v. McCree***, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), this Court held the removal of ***Witherspoon*** excludables from a capital felony murder venire contravened neither the Sixth Amendment fair cross section requirement nor the constitutional guarantee of a fair and impartial jury. Writing for the Court, Justice Rehnquist noted that the Sixth and Fourteenth Amendment fair cross section requirement, as applied to the States, imposed no requirement that the jury actually chosen reflect the composition of the community at large. ***Lockhart v. McCree***, 90 L.Ed.2d at 147-48. ***See also Batson v. Kentucky***, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d at 79 (Note 4) (1986). Justice Rehnquist acknowledged that the fair cross section requirement protects the criminal defendant's right to the common sense judgment of the community. ***Lockhart v. McCree***, 90 L.Ed.2d at 148. However, the Constitution requires no intellectual or political balancing in the selection of the actual jurors in a criminal trial. Justice Stewart's ***Witherspoon*** opinion similarly refers to the jury function as the conscience of the community in determining the capital defendant's sentence. As the ***Lockhart*** and ***Witherspoon*** opinions recognize, the fair cross section requirement applies to the jury venire from which the panel flows. No defendant stands entitled to a particular venireman serving as a juror on the defendant's jury.

In ***Lockhart***, the Court also discussed the claim that death qualification deprives the defendant of a constitutionally fair and

impartial jury. In rejecting this argument, this Court held that an impartial jury consists of nothing more than jurors who will conscientiously apply the law and find the facts. ***Lockhart v. McCree***, 90 L.Ed.2d at 154-55 (1986).

Thus, this Court's recent cases involving the fair cross section and fair and impartial jury guarantees recognize that even in a capital trial the venire from which the jurors are chosen only must represent a fair cross section of the community. A fair and impartial jury need not mirror the racial, educational, political, or socio-economic parameters of the community so long as the jury chosen may conscientiously apply the law and find the facts. ***Lockhart v. McCree, supra***; ***Witherspoon v. Illinois, supra***.

Nineteen years ago, this Court recognized that constitutional error could be harmless. ***Chapman v. California***, 386 U.S. 18 (1967). The record must reflect, however, and the reviewing court must determine beyond a reasonable doubt, that the alleged constitutional error did not contribute to the defendant's conviction. ***Chapman v. California***, 386 U.S. at 23-24.

This Court reaffirmed the harmless constitutional error doctrine in ***United States v. Hasting***, 461 U.S. 499 (1983). Writing for the majority, the Chief Justice reviewed the court's ***Chapman*** opinion. Chief Justice Burger noted that "[i]n holding that the harmless-error rule governs even constitutional violations under some circumstances, the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error -free, perfect trial, and that the Constitution does not guarantee such a

trial." ***United States v. Hasting***, 461 U.S. at 508-9. (citations and footnotes omitted) The Chief Justice continued, noting that "[s]ince ***Chapman***, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations (citations omitted)." ***United States v. Hasting***, 461 U.S. at 509. Absent such an approach to errors of even a constitutional dimension, as the Court noted in ***Hastings***, our courts would become impregnable citadels of technicality, divorced from the real world and insulated from their responsibilities.

This Court has considered the applicability of the harmless constitutional error standard in a variety of contexts. ***See Rose v. Clark***, ___ U.S. ___, ___ U.S.L.W. ___ (July 2, 1986). Recently, this Court applied the harmless constitutional error analysis to a violation of the Sixth Amendment confrontation clause ***Delaware v. Van Arsdall***, 475 U.S.___, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1985). See also ***Harrington v. California***, 395 U.S. 250 (1969) and ***Schneble v. Florida***, 405 U.S. 427 (1972). Although not specifically applying the doctrine of harmless error, this Court adopted a harmless constitutional error analysis to Fourth Amendment search and seizure issues in ***Nix v. Williams***, 467 U.S. 431 (1984)(inevitable discovery exception to the exclusionary rule). In ***Berkemer v. McCarty***, 468 U.S. 420 (1984) (custodial interrogation), this Court declined to apply the harmless error doctrine where the record appeared incomplete.

Likewise, ineffective assistance of counsel claims raised under the Sixth Amendment guarantee of effective assistance of counsel stand subject to harmless error analysis. ***Strickland v. Washington***, 466 U.S. 668 (1984). A defendant asserting constitutionally ineffec-

tive counsel must prove both counsel's constitutional ineffectiveness and resultant prejudice. The Court recognized that the Sixth Amendment does not guarantee a defendant perfect, error-free representation. ***Strickland v. Washington, supra***. Other Sixth Amendment cases applying the harmless error analysis include ***McKaskle v. Wiggins***, 465 U.S. 168 (1984), and ***Rushen v. Spain***, 464 U.S. 453 (1983).

A violation of a defendant's Fifth Amendment privilege against self-incrimination is also subject to the harmless constitutional error analysis in certain circumstances. For instance, ***Chapman v. California***, 386 U.S. 18 (1967) involved prosecutorial comment on the defendant's failure to testify. Subsequently, the Court reaffirmed the harmless error concept as applied to Fifth Amendment violations of this nature in ***United States v. Hasting***, 461 U.S. 499 (1983).

The only cases in which this Court has refused to recognize a harmless error analysis deal with errors involving, "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error...", ***Chapman v. California***, 386 U.S. at 23, or those errors which, due to their nature, the Court cannot ascertain beyond a reasonable doubt did not contribute to the verdict. ***Chapman v. California, supra***. These types of error include the State's total denial of a criminal defendant's Fifth Amendment right to counsel; ***Gideon v. Wainwright***, 372 U.S. 335 (1963); or the State's coercion of a confession; ***Payne v. Arkansas***, 356 U.S. 560 (1958), or the State's systematic exclusion of blacks from a grand jury. ***Vasquez v. Hillery***, 474 U.S. __, 106 S.Ct. 617, 88 L.E.2d 598 (1986).

In ***Vasquez***, for example, this Court, in rejecting a harmless error analysis, noted that systematic exclusion of blacks from the grand

jury undermined the structural integrity of the criminal tribunal itself, since the grand jury chose whether to return a true bill or not, the degree of the offense to charge, and whether or not to return single or multiple indictments against a particular defendant. Additionally, the very nature of the grand jury process rendered impossible any attempt by the appellate court to determine the violation's effect on the jury verdict.

Thus, the Court will not apply the harmless error analysis where the case involves a violation of a basic, substantial constitutional right. Similarly, the Court will not apply the harmless error doctrine if the record provides no factual basis for a harmless error analysis. However, the Court will apply the harmless error analysis where the alleged constitutional violation concerns other than basic rights and the effect of the alleged constitutional error appears in the record. As the majority of this Court recently re-emphasized in ***Rose v. Clark, supra***:

> ...While there are some errors to which ***Chapman*** does not apply, they are the exception and not the rule....Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis.

The matter before this Court plainly falls within those cases in which this Court consistently has applied the harmless constitutional error standard. Certainly the fact that this case is a capital one does not preclude the use of a harmless error analysis since this Court has employed the harmless error doctrine in various contexts in capital

cases as well as non capital cases. ***Zant v. Stephens***, 462 U.S. 862 (1983); ***Hooper v. Evans***, 456 U.S. 605 (1982). The issue of applicability of the harmless error doctrine, then, revolves around the type of constitutional error asserted as opposed to whether or not the case is a capital one.

The particular facts of this case involve the erroneous grant of a State's ***Witherspoon*** challenge for cause when the defendant retained peremptory challenges and, earlier in the selection process, the trial judge improperly denied ***Witherspoon*** challenges and forced the State to expend peremptory challenges to remove the plainly unqualified jurors. While this case raises the issue of the erroneous ***Witherspoon*** exclusion of a juror, the case does not involve the wholesale exclusion of the entire class of persons opposed to or expressing reservations concerning the death penalty. Thus, although raising a ***Witherspoon*** issue, this case stands apart from the constitutionally infirm practice condemned by this Court in ***Witherspoon v. Illinois*** 391 U.S.510 (1968). Furthermore, this case presents the Court with no wholesale exclusion of a distinctive group from the venire, grand jury, or from the petit jury itself, condemned in ***Batson v. Kentucky***, 476 U.S. ___,106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). See also ***Lockhart v. McCree***, 476 U.S.___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) and ***Vasquez v. Hillery***, 474 U.S.___, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). In fact, as Justice Rehnquist noted in ***Lockhart v. McCree, supra, Witherspoon*** excludables do not constitute a distinctive group for fair cross section purposes. The facts herein contain no suggestion that the jury, as constituted, failed conscientiously to apply the law and find the facts as required by the Sixth amendment fair and impartial jury guarantee. See ***Lockhart v. McCree, supra***. The alleged

constitutional error, then, in no manner affected the defendant's substantial rights since there is no showing that the jury which did try the defendant was other than an impartial adjudicator. Thus, under these facts, the alleged constitutional error in no manner undermines the structural integrity of the criminal tribunal itself, nor does the asserted error strike at the fundamental nature of the jury's sentencing determination. Application of the harmless constitutional error analysis clearly is warranted under such circumstances. ***Chapman v. California***, 386 U.S. 18 (1967).

The facts necessary to a reviewing court's determination whether or not the constitutional error contributed to the jury's sentencing decision plainly appear in the record. Capital case records on appeal almost invariably contain, or may be amended to contain, the record of the jury selection proceedings, including the voir dire questioning and the arguments of counsel concerning ***Witherspoon*** challenges and exclusions. The record, too, plainly reveals the number of peremptory challenges remaining to the defendant and the State. Thus, a reviewing court may readily ascertain whether, under the facts of a particular case, the defendant suffered actual prejudice or the court's error, if any, is harmless in the particular context.

CONCLUSION

The appellate courts must carefully scrutinize capital sentencing cases for circumstances which create an unacceptable risk that the jurors mistakenly or arbitrarily imposed a death sentence. In the course of this scrutiny, however, the courts must avoid standing as impregnable citadels of technicality and recognize that fallible human beings conduct criminal trials. A perfect trial occurs only in fiction.

Where constitutional error affects no right basic to a fair trial, and the record provides an adequate basis in fact for a determination that the constitutional error appears harmless beyond a reasonable doubt, the appellate courts should accept the human fallibilities inherent in our system of laws administered by humans and utilize the doctrine of harmless error. Where a trial court erroneously grants a State's ***Witherspoon*** challenge for cause, the error should be harmless indeed if the defendant failed to exhaust his peremptory challenges at the conclusion of the jury selection, and particularly so where the State earlier suffered the erroneous denial of a ***Witherspoon*** challenge and peremptorily removed the unqualified juror.

WHEREFORE, the States respectfully urge this Court to apply the harmless error analysis to ***Witherspoon*** exclusions and affirm the judgment of the Mississippi Supreme Court.

Respectfully submitted,

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